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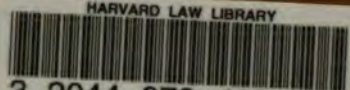
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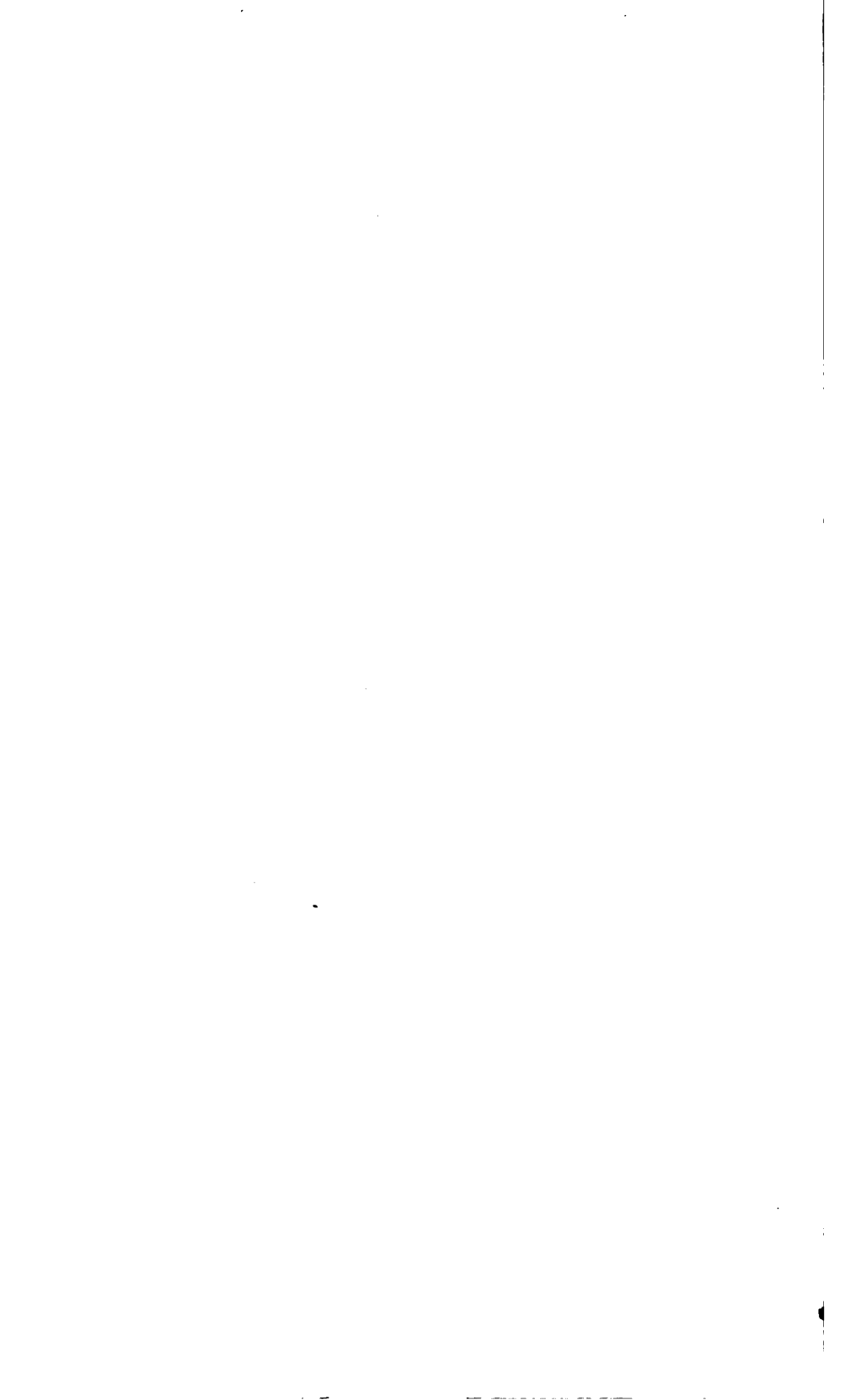
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REPORT OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

TERRITORY OF ARIZONA

FROM 1900 TO 1901 INCLUSIVE

E. W. LEWIS
REPORTER

VOLUME SEVEN

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY

LAW PUBLISHERS AND LAW BOOKSELLERS

1906

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July 31*

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Rec. April 23, 1906

SUPREME COURT.

1900-1901.

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GEORGE R. DAVIS, Associate Justice.

FLETCHER M. DOAN, Associate Justice.

RICHARD E. SLOAN, Associate Justice.

OFFICERS OF THE COURT.

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CHARLES F. AINSWORTHAttorney-General

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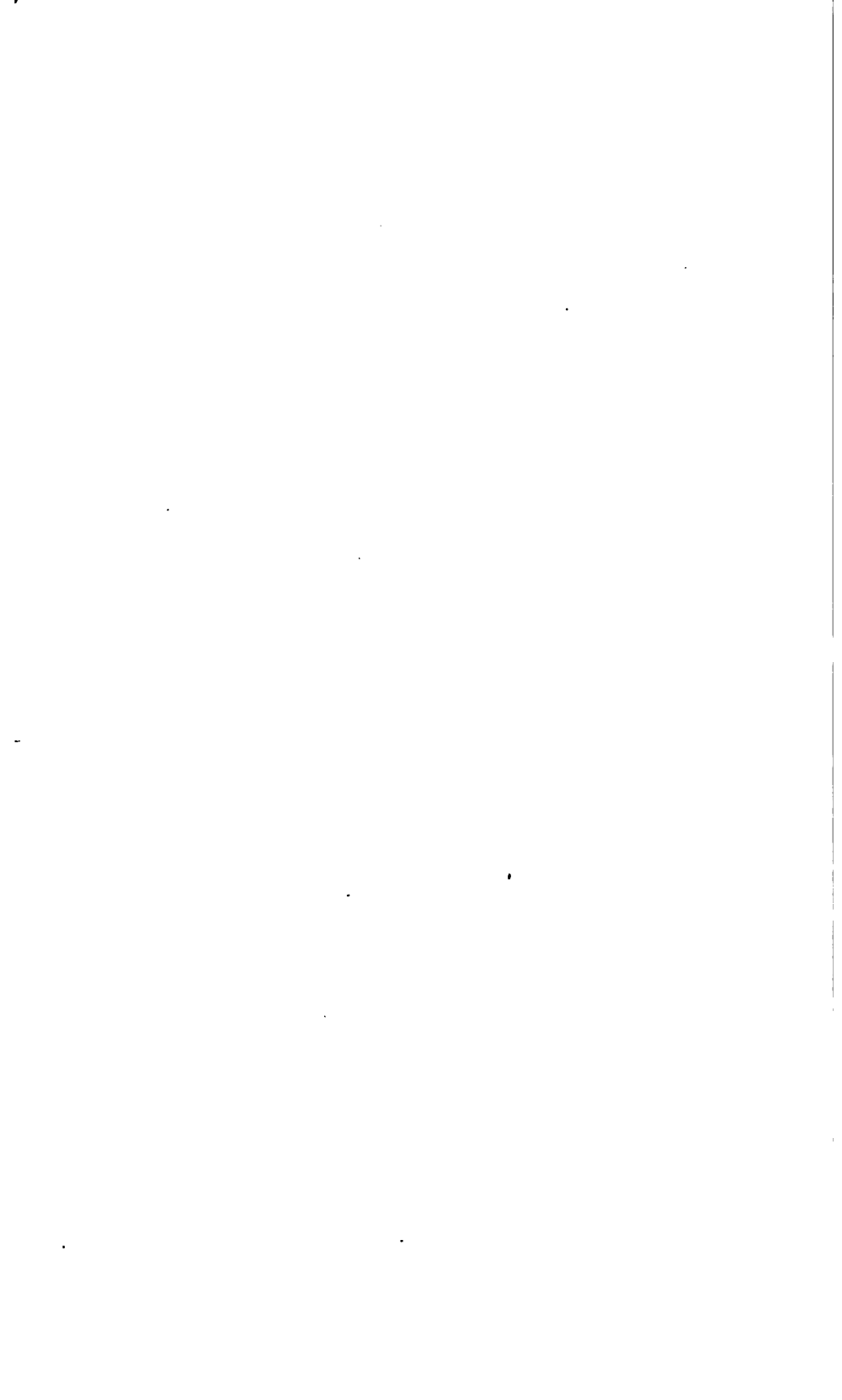
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¹ Died January 7, 1900.

² Appointed January 8, 1900; resigned November 2, 1901.

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RULES OF COURT.

SUPREME COURT OF THE TERRITORY OF ARIZONA.

RULE X.

I. All "abstracts of record" shall contain: 1. The pleadings, original or amended, upon which the issues were tried, omitting the title in each except the complaint or amended complaint; 2. The findings of fact and conclusions of law, or the verdict; 3. The judgment; 4. The motion for new trial; 5. The minute entries of the trial court; 6. Such other portions of the record as may be necessary to inform the court of the errors relied on without an investigation of the record itself.

II. Abstracts of record and transcripts of the evidence shall be printed on white paper, eight inches by ten inches in size, with pica type, or in typewriting (not exceeding a second impression), with a sufficient margin to permit their being bound together in book form on the left-hand side, and shall be so fastened. At least six copies of the abstract of record shall be filed with the clerk.

III. Abstracts of record and transcripts of evidence not conforming to this rule may be stricken from the files on motion of the party affected by such non-compliance.

IV. When a transcript of the record is not filed, then an abstract of record is essential, and such abstracts of record as are filed will be treated by the court as containing all such portions of the record as the parties deem sufficient, upon which to try the assignments of error.

Adopted this twenty-eighth day of March, A. D. 1900.

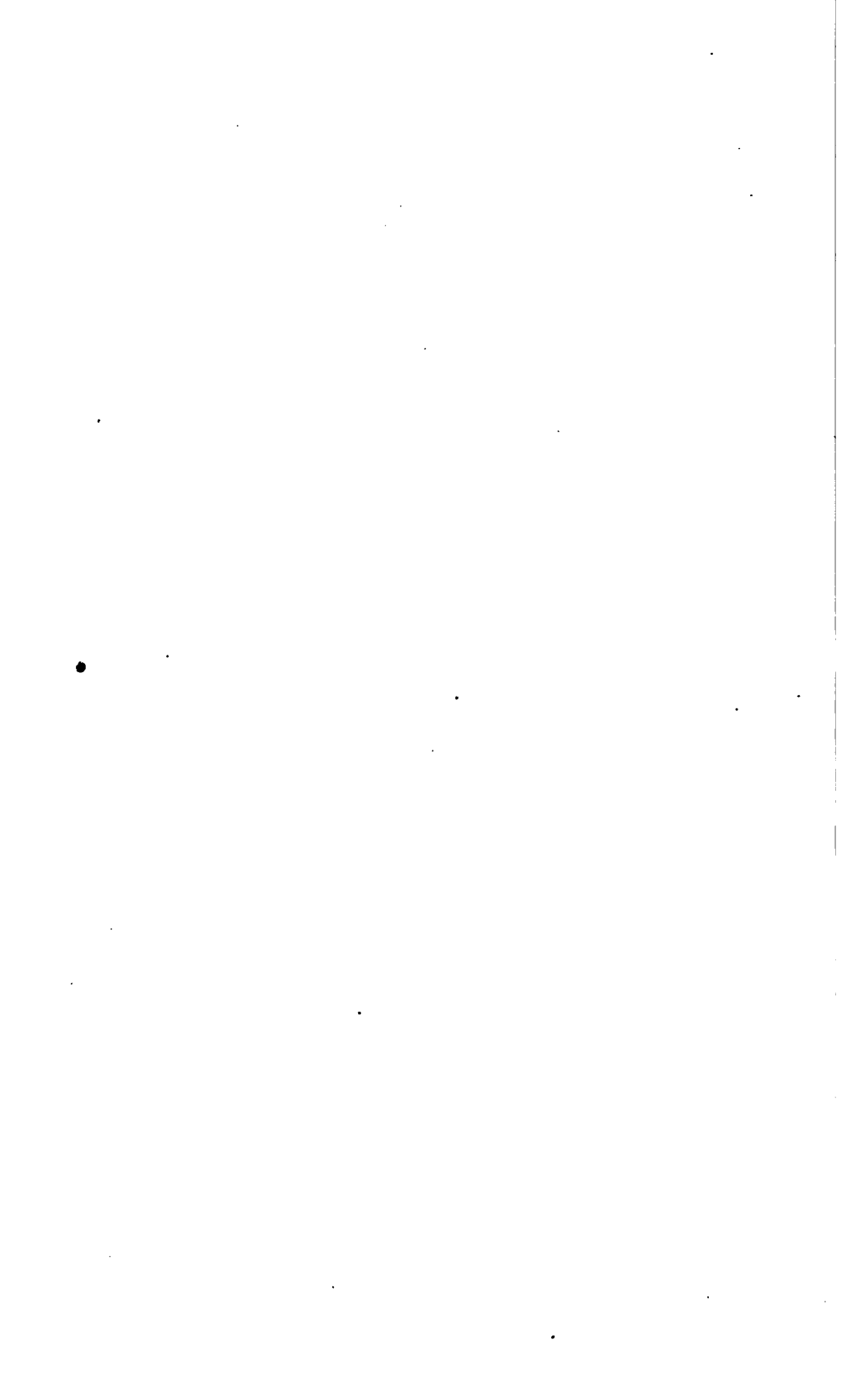


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DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1900.

[Civil No. 706. Filed March 28, 1900.]

[60 Pac. 722.]

**UTAH CANAL ENLARGEMENT AND EXTENSION
COMPANY, Plaintiff and Appellant, v. THE LONDON
COMPANY et al., Defendants and Appellees.**

1. **APPEAL AND ERROR — ASSIGNMENTS OF ERROR — WAIVER — LAWS OF ARIZ., ACT MARCH 18, 1897, CONSTRUED.**—Where there is no assignment of errors in appellant's brief, and there is a failure to distinctly specify any ground of error, there is a failure to comply with the provisions of the statute, *supra*, providing that "the brief of the plaintiff in error or appellant . . . shall contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived," and the judgment of the trial court will be affirmed.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellant.

A. J. Daggs, and J. McAndrew, for Appellees.

PER CURIAM.—This appeal is taken under the act of the legislative assembly approved March 18, 1897, one of the mandatory provisions of which is that "the brief of the plain-
Arizona 7—1

tiff in error or appellant shall . . . contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived." There is no assignment of errors contained in the brief of the appellant in this case, and in the omission to distinctly specify any ground of error for the reversal or modification of the judgment appealed from the appellant has failed of compliance with the statute. No error is apparent upon the face of the record, and the judgment of the court below is affirmed.

[Civil No. 699. Filed March 28, 1900.]

[60 Pac. 692.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. LEE CHING GOON, Defendant and Appellee.

1. **APPEAL AND ERROR—CHINESE EXCLUSION ACT—DISCHARGE—NO APPEAL BY UNITED STATES—ACT OF CONGRESS SEPTEMBER 13, 1888, SEC. 13, 25 U. S. STATS. AT LARGE, 479, CONSTRUED.**—The United States has no right to appeal from an order made by a court commissioner discharging a Chinaman of the privileged class, the Chinese Exclusion Act (act of Congress, September 13, 1888, sec. 13) authorizing commissioners of United States courts to order the deportation of Chinese not of the privileged class, and giving such Chinese a right of appeal to the United States district court within ten days.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Fletcher M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

Robert E. Morrison, United States District Attorney, and Thomas D. Bennett, Assistant United States District Attorney, for Appellant.

Owen T. Rouse, for Appellee.

DAVIS, J.—The appellee was arrested upon a warrant issued by Frank Dysart, a United States commissioner for the

second judicial district, charging him with being in the United States in violation of the Chinese Exclusion Acts. Upon a hearing before the commissioner, he was found and adjudged to be a Chinese person of the privileged class, lawfully entitled to remain in the country, and ordered discharged. The government appealed to the district court from the commissioner's order, and that court dismissed the appeal for want of jurisdiction. The case is here on appeal from the district court's order of dismissal.

The sole question presented is whether the government has the right of appeal to the district court from the order of the commissioner. Section 13 of the act of Congress approved September 13, 1888, (25 Stats. 479,) provides "that any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district." An act of May 28, 1896, (29 Stats. 184,) abolished the office of commissioner of the circuit court, authorized the appointment by the district courts of United States commissioners, and provided that all acts and parts of acts applicable to commissioners of the circuit courts, except as to appointment and fees, should be applicable to such United States commissioners. The powers of the commissioner are, in general, those of a committing magistrate; but, for the purposes of the enforcement of the Chinese Exclusion Acts, Congress has enlarged his jurisdiction, in section 13, *supra*, and made it concurrent with that of any justice, judge, or United States court, in deportation cases. The proceeding in these cases is special and statutory. It is analogous to a criminal action, in the respect that the machinery is criminal. But whether the proceeding be criminal or civil in

its nature is not material, in our view, to the determination of the question which the record presents. The right to an appeal depends entirely upon the statute. If the statute does not confer it, it does not exist. There is no general provision of the law authorizing appeals from a United States commissioner to the district court. The act of September 13, 1888, in the section quoted, expressly authorizes an appeal by the defendant to the "judge of the district court" in cases of this nature. It contains no provision, however, for any appeal on behalf of the government, and the maxim "*Expressio unius est exclusio alterius*" clearly applies. The commissioner is given original and final jurisdiction, concurrent with that of any justice, judge, or United States court; and his judgment, when rendered, cannot be reviewed, except upon an appeal by the defendant. The district court properly dismissed the appeal, and its order in that regard is affirmed,

Street, C. J., and Sloan, J., concur.

[Civil No. 677. Filed March 28, 1900.]

[60 Pac. 693.]

MARICOPA COUNTY, Defendant and Appellant, v. F. C. JORDAN, Plaintiff and Appellee.

1. **APPEAL AND ERROR—TO SUPREME COURT—TRIAL DE NOVO.**—The supreme court does not take cases from the district courts as those courts take cases appealed from the justices' courts, and try them *de novo*, but reviews the rulings of the district court when properly assigned as error and presented for revision.
2. **SAME—ASSIGNMENT OF ERRORS—NECESSITY.**—Where on appeal no errors are assigned, and none appear on the face of the record, the judgment of the lower court will be affirmed.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellant.

C. M. Frazier, and J. M. Hamilton, for Appellee.

DOAN, J.—T. C. Jordan brought an action against Maricopa County, in the district court of said county, on November 20, 1897, to recover twelve hundred dollars as compensation for his services as immigration commissioner from the first day of October, 1895, to the thirtieth day of September, 1897, and on the ninth day of April, 1898, recovered judgment therein for four hundred and fifty dollars and interest from the first day of October, 1897, and costs of suit. From this judgment and the order of the court denying a new trial the defendant appeals.

The different legal issues involved in the case are presented *seriatim*, and argued at length in the appellant's brief, but there is no assignment of error, as required by our practice. This court does not take cases from the district courts like those courts take cases appealed from justices' courts, and try them *de novo*, but the Revised Statutes of the territory, and the rules of this court alike, provide that the rulings, orders, and decrees of the district court that are complained of must be assigned as errors, and presented to this court for revision, and that, when properly presented, they will be reviewed and reversed or sustained; and the determination of the case here will depend on the disposition that is made of the rulings and judgment of the lower court that are thus presented.

Where no errors are assigned, and none appear on the face of the record, the judgment of the lower court will be affirmed. *Daggs v. Hoskins*, 5 Ariz. 236, 52 Pac. 350; *Daggs v. Field*, 6 Ariz. 47, 52 Pac. 773; *Trimble v. Long*, 6 Ariz. 268, 56 Pac. 731. No error being apparent on the face of the record, the judgment of the lower court is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 704. Filed March 28, 1900.]

[60 Pac. 720.]

THE NATIONAL FIRE INSURANCE COMPANY, Defendant and Appellant, v. DANIEL H. MING, Plaintiff and Appellee.

1. INSURANCE—DEFENSE—GARNISHMENT—SITUS OF DEBT—JURISDICTION—ACTION IN REM.—Plaintiff in Arizona sued defendant on an insurance policy. Defendant set up as a defense that it was engaged in a general fire-insurance business, with its general offices in San Francisco, where the general manager conducted all business and kept all funds for the payment of losses; that after receipt of plaintiff's proofs of loss, plaintiff's California creditors brought suit against it, service being had on plaintiff by publication, and garnished, under the attachment laws of the state of California, the amount due plaintiff upon his policy of insurance, and that upon judgment against plaintiff in said suits defendant discharged its liability to plaintiff by paying to plaintiff's creditors in garnishment proceedings the full amount due plaintiff upon his policy of insurance. *Held*, that the situs of the debt was in California, subject to garnishment by plaintiff's creditors, and therefore payment under said garnishment proceedings was a defense to plaintiff's action.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Reversed.

The facts are stated in the opinion.

Moorman & McFarland, for Appellant.

By complying with the laws of California in the appointment of an agent upon whom service may be had, appellant became a resident to the same intent and purposes as a domestic corporation. Pol. Code California, secs. 608, 616; Black on Judgments, sec. 910; *Dittenhoefer v. Cœur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660; *Mooney v. Buford & George Mfg. Co.*, 72 Fed. 32, 18 C. C. A. 421; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354; *Barry v. King*, 96 Pa. St. 485; *Lafayette Ins. Co. v. French*, 18 How. 404; *Christmas v. Russell*, 5 Wall. 290.

The California courts had jurisdiction of the person of the appellant and the subject-matter of the suits, and "the credits, debts, or property" of appellant were attached. Then, the only legal conclusion at which the court could have

arrived would be, that the California courts, having complete jurisdiction in the attachment proceedings over the person of the appellant and the subject-matter of the suits, and the *res* having been seized as provided by the California code, appellee, Ming, could not recover because appellant's liability under these attachment proceedings and its discharge by payment to the judgment creditors is a complete bar to this action. *Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 48 Pac. 332; *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 36 Am. St. Rep. 166, 33 Pac. 870; *Cooper v. Reynolds*, 10 Wall. 308; *Paine v. Moorland*, 15 Ohio, 436; *Union Pacific Ry. Co. v. Baker*, 5 Kan. App. 253, 47 Pac. 563; *Hahn v. Kelly*, 34 Cal. 391; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165; *Mutual Life Ins. Co. v. Harris*, 97 U. S. 331.

The liability of the appellant under the attachment proceedings is determined by the laws of California. *Renaud v. Abbott*, 116 U. S. 277, 94 Am. Dec. 742, and note; *Cheever v. Wilson*, 76 U. S. 108; *Chew v. Brumagen*, 80 U. S. 497.

E. J. Edwards, for Appellee.

The judgments obtained against Daniel H. Ming, the appellee, in California, are absolutely void. *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354.

The appellant is a foreign corporation, and has no residence outside of the state of its creation. *Bank of Augusta v. Earl*, 13 Pet. 519; *Insurance Co. v. French*, 18 How. 404; *Railroad Co. v. Koontz*, 104 U. S. 12; *Shaw v. Quincy Min. Co.*, 145 U. S. 144, 12 Sup. Ct. 935; *Filli v. Delaware, L. and W. R. Co.*, 37 Fed. 65; *Fales v. Chicago, M. and St. P. Ry. Co.*, 32 Fed. 678.

The *situs* of the debt owing to Ming from the appellant was in Arizona. *Reimers v. Seatco Mfg. Co.*, 70 Fed. 573; *Douglas v. Insurance Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448, 33 N. E. 938; *Everett v. Walker*, 4 Colo. App. 509, 36 Pac. 616; *Bowen v. Pope*, 125 Ill. 28, 8 Am. St. Rep. 330, 17 N. E. 64; *Haggerty v. Ward*, 25 Tex. 144; *Renier v. Hurlbut*, 81 Wis. 24, 29 Am. St. Rep. 850, 50 N. W. 783; *Williams v. Ingersoll*, 89 N. Y. 508; *Central Trust Co. v. Chattanooga*, 68 Fed. 685; *Illinois Cent. Ry. Co. v. Smith*, 70 Miss. 344, 35 Am. St. Rep. 651, 12 South. 461; *Wyeth Co. v. Lang*, 127 Mo. 242, 48 Am. St. Rep. 626, 29 S. W. 1010.

The appellee's claim against the appellant was a mere chose in action, and not subject to attachment in the state of California. *Atchison, T. and S. F. Ry. Co. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985; *Everett v. Connecticut Mut. Life Ins. Co.*, 4 Colo. App. 509, 36 Pac. 616; *Douglas v. Insurance Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448, 33 N. E. 209; *Pinney v. McGregory*, 102 Mass. 186; Brown on Jurisdiction, sec. 150.

The appointment of an agent by the National Fire Insurance Company in California, on whom service of process could be made, so as to enable it, under the laws of the state, to do business therein, in no sense changes its domicile so as to make a debt owing by it to a resident of Arizona an indebtedness existing in California. *Denton v. International Co.*, 36 Fed. 3; *Railroad Co. v. Koontz*, 104 U. S. 12; *Fales v. Chicago, M. and St. P. Ry. Co.*, 32 Fed. 678.

SLOAN, J.—On the seventh day of June, 1897, the appellee, Daniel H. Ming, obtained a policy of insurance from the appellant, the National Fire Insurance Company, a corporation organized under the laws of the state of Connecticut, and doing a general fire-insurance business in Arizona, on a certain store-building situate in Fort Thomas, Graham County, Arizona, in the sum of fifteen hundred dollars. On the ninth day of June, 1897, the building insured was totally destroyed by fire. The amount due on said loss not having been paid to Ming, he brought suit in the district court of Graham County against the insurance company to recover upon the policy the amount of the insurance. The company set up as a defense that at the time the policy was issued, and ever since, it was engaged in a general fire-insurance business in Arizona and the several states on the Pacific Coast; that it had a general agent and office in San Francisco for the management of its Pacific Coast business, and that George D. Dornin was such general agent; that the scope of Dornin's agency included the entire control, management, and transaction of the business of defendant within said territorial limits; that the funds for the payment of losses within said territory were kept by him in San Francisco, and disbursed by him, in the conduct and management of defendant's business, as occasion might require; that the defendant has local agents in the several states and territories to receive applications and

countersign policies, but these have no authority to pay or settle losses; that after the destruction of the building by fire, and the proof of loss by plaintiff, creditors of Ming in California brought suits in the superior court of the city and county of San Francisco, and in the justice courts of said city and county, on personal debts due and owing to them from said Ming, and in the said suits garnished, under the attachment laws of the state of California, the amount due Ming, upon said policy of insurance, the funds for the payment of which were alleged to have been then and there in the hands of, and under the control of, George D. Dornin, the general agent of the company; that due service was had upon Ming in the several suits by publication, and the deposit in the post-office at San Francisco of a copy of the summons issued in each of said suits, duly addressed, with postage prepaid, to Ming, at his residence in Arizona; that judgments were obtained in each of said suits against Ming, whereupon, and before the commencement of this suit, defendant discharged its liability to Ming by paying to one W. Rigby, the attorney of record for the several plaintiffs in the said several causes, under and by virtue of said attachment proceedings, the sum of fifteen hundred dollars, the same being the debt due Ming on account of said policy of insurance; and that by reason thereof, the defendant alleged, it had fully discharged and satisfied its liability to Ming under and by virtue of the said policy of insurance. The trial court found the facts substantially as alleged in the answer of the defendant, and gave judgment for the plaintiff, upon the ground that the California courts did not acquire jurisdiction by virtue of the garnishment proceedings against Dornin, the general agent of the company. The sole question presented by the record, therefore, is whether the payment of the amount due Ming on the policy of insurance by the general agent of the company in discharge of the garnishments issued in the suits brought by the California creditors of Ming constitutes a defense to this suit.

It was essential to the jurisdiction of the California courts that personal service within the state was had on Ming, or that property belonging to him was seized and brought under the control of those courts by attachment or garnishment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. A debt is such

property, and, if attached, will confer jurisdiction upon the court to subject it to the payment of its judgment against a defendant not personally served. The *situs* of a debt for purposes of garnishment has, however, been a vexed question, and has been variously answered. Some courts hold that the *situs* of a debt is at the residence of the creditor; others, that it is at the residence of the debtor; and still others, that it is wherever it is payable. In the case of *Railroad Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, the supreme court has settled the question for this court by deciding that the *situs* of a debt for purposes of attachment and garnishment, following the policy of the law which protects home creditors through administration proceedings, is at the domicile of the debtor, or wherever the latter may be found and sued by the creditor. Under this decision it follows, therefore, that if Ming could, under his policy of insurance, have sued the insurance company in California, and recovered his loss there, then the California creditors could have attached the debt, and subjected it to the payment of their claims against Ming. We are not able to find any adjudications of the supreme court of California which decide the question whether, in that state, a non-resident will be permitted to maintain an action *in personam* upon a debt contracted and payable in another state, against a foreign corporation having an agent there upon whom process may be served. The California statutes appear to be silent upon the subject. Those states which have denied the privilege to a non-resident to sue a non-resident in the domestic courts place the refusal to entertain such suits upon the ground, largely, that there is a want of jurisdiction in the domestic tribunals over the subject-matter of such suits. While this might be true in a certain class of cases, this reasoning cannot apply to such suits as are transitory in their nature, and which, using the language of Parsons, "accompany the creditors everywhere, and authorize a demand upon the debtor everywhere." If by local statute a foreign corporation may be served by process upon an agent appointed for that purpose, the better reasoning appears to be with those cases which hold that, in a suit brought by a non-resident to collect a debt contracted in another state, service upon the agent of the foreign corporation sued will confer jurisdiction upon the local tri-

bunal, both of the person of the defendant and of the subject-matter. *Johnson v. Insurance Co.*, 132 Mass. 432. It is, however, unnecessary to decide the precise question whether, under the law of California, Ming could have sued and maintained a purely personal action against the insurance company by service upon its agent there; for the reason that, under the pleadings and proof in this case, Dornin, the general agent of the company, had funds belonging to the company in his possession and under his control in San Francisco, which, under the laws of California, were attachable. Ming could, therefore, have maintained, by attaching this money or effects of the company in the hands of the general agent, a suit in California, which would be one in the nature of an action *in rem*. If, then, the courts of that state were open to Ming, they certainly were to his California creditors; for under no conceivable circumstances would a domestic tribunal deny to a resident suitor a privilege which it would grant to a non-resident suitor. There are cases which hold that it is the duty of the garnishee to notify the non-resident defendant of the pendency of the garnishment proceedings, and if he fails to do this, and the defendant be not otherwise notified, the former may not protect himself against a suit by the latter in another state by setting up payment under the garnishment. *Morgan v. Neville*, 74 Pa. St. 52; *Pierce v. Railroad Co.*, 36 Wis. 283. An examination of the cases just cited will show that the debts garnished were exempt under the laws of the state where the non-resident defendants resided, and the reasoning in each proceeds upon the view that the non-resident defendant was denied, through the failure of his debtor to notify him of the garnishment proceedings, the right to claim such exemption at the forum. This view must necessarily rest upon the doctrine that exemption laws are a part of the contract,—a doctrine which the supreme court, in the *Sturm* case, cited above, disposes of in the following language: "Exemption laws are not a part of the contract. They are a part of the remedy, and subject to the law of the forum." There might be other defenses which a non-resident defendant, if notified of the suit, might make which would defeat a recovery. Should it appear that this is the case, and the garnished debtor took no steps to protect his creditor or notify him, it seems reasonable that he ought not to be per-

mitted to avail himself of the defense of payment under the garnishment proceedings. It is conceivable, too, that a defendant might have knowledge that a suit has been brought against him in another state, and yet, relying upon want of jurisdiction in the foreign court over his person, or deterred by the expense of litigating such suit, might forego to defend against it and set up even a valid defense, which he otherwise would do, were he notified that the plaintiff in the suit was proceeding to condemn his property. The record in this case is silent as to whether Ming was notified of the garnishment proceedings in the California suits, or obtained actual knowledge of their pendency. No point seems to have been made upon this want of knowledge, if it existed; nor does it appear that Ming had any valid defense to any of these suits. His case is presented here, as doubtless in the court below, solely upon the one point,—that of want of jurisdiction in the California courts to render judgment against him without personal service within the state; and this we hold, under the authority of the *Sturm* case, not to have been well taken. The latter case was not in print at the time of the decision of this case, and the learned judge who rendered the decision did not, therefore, have its guidance in the determination of this much-mooted and heretofore unsettled question. The judgment is reversed, and the cause remanded for new trial.

Street, C. J., and Davis, J., concur.

[Criminal No. 144. Filed March 28, 1900.]

[60 Pac. 698.]

PETER R. BRADY, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—EMBEZZLEMENT—INDICTMENT—SUFFICIENCY—PARS. 675, 1457, 1459, 1467, PEN. CODE, REV. STATS. ARIZ. 1887, CITED AND CONSTRUED.—Under paragraph 675 of the Penal Code, *supra*, making every officer of a county charged with the receipt, safe-keeping, transfer, or disbursement of public money, who without authority of law appropriates the same to his own use, punishable by imprisonment, an indictment charging that defendant was "an

officer of said county of Pinal,—to wit, county treasurer, . . . and by virtue of his said office, then and there by law was charged with the receipt, safe-keeping, and disbursement of the public moneys . . . and acting in such office . . . did . . . willfully, feloniously, and without authority of law appropriate to his own use a part of the moneys intrusted to him as aforesaid," tested by the requirements of paragraphs 1457, 1459, and 1467 of the Penal Code, *supra*, is sufficient in form, and states facts to constitute a public offense, —to wit, receipt by an officer of public moneys and appropriation of said public moneys to his own use without authority of law.

2. **SAME—INDICTMENT—COUNTY—NAME—SUFFICIENCY.**—An indictment is sufficient which designates a county as the "County of Pinal," there being no express provision of the statute that the name shall be "Pinal County," and both being used interchangeably in both the Civil and Penal codes.
3. **SAME—SAME.**—Where the statute gives no name to the offense it is immaterial whether or not the pleader has aptly named it.
4. **JUROR—OPINION—UNQUALIFIED—PAR. 1629, PEN. CODE, REV. STATS. ARIZ. 1887—DISQUALIFICATION.**—A juror is disqualified to sit in the trial of a case when he has formed or expressed an unqualified opinion as to the guilt or innocence of the defendant, within the provisions of the statute, *supra*. An opinion less decided than this may also be sufficient of itself, or in connection with other proof, to exclude a juror, when it appears that it will prevent him from acting with entire impartiality.
5. **SAME—BIAS—QUESTION OF FACT FOR COURT TO DECIDE—APPEAL AND ERROR—REVIEW—ERROR MUST BE MANIFEST.**—A challenge of a juror on the ground that the juror has such an opinion as would prevent him from acting with entire impartiality raises an issue of fact for the court to determine, and the finding of the trial court upon that issue should not be set aside unless the error is manifest.
6. **SAME—SAME—VOIR DIRE—TESTIMONY GIVEN ON—TRIAL COURT TO DECIDE ON.**—The Penal Code (par. 1629) provides that a juror who has formed or expressed an unqualified opinion is disqualified from acting in a criminal case. A juror testified on his *voir dire* that he had formed an opinion which would require evidence to overcome, from talking with persons who he thought knew the facts, and from hearing a part of the testimony on a former trial; that he would want considerable more evidence to come to a conclusion as to the guilt or innocence of the accused; that he would not be able to find a verdict from what he then knew; that he had known defendant for about twelve years, and had a friendly feeling for him; but that he could determine the case entirely on the evidence, and would disregard any opinion that he had previously obtained. *Held*, not to show such bias on the part of the juror as would warrant a reversal of a conviction on the ground of error in overruling a challenge for actual bias.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

E. J. Edwards, J. S. Sniffen, and Mark Smith, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

If the facts constituting the offense are sufficiently charged in the indictment, the appellation of the crime is an immaterial matter. *People v. Phipps*, 39 Cal. 331; *People v. Cud-dih*, 54 Cal. 53; *People v. Dalton*, 58 Cal. 226.

The rule in the United States is, that to disqualify a juror on the ground that he has formed an opinion on the case the opinion so formed must be a fixed, absolute, positive, definite, settled, decided, unconditional opinion. *People v. Reynolds*, 16 Cal. 132; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *State v. Kingsbury*, 57 Me. 238; *O'Mara v. Commonwealth*, 75 Pa. St. 424; *Staup v. Commonwealth*, 74 Pa. St. 458.

The fact that he heard part of the evidence on a former trial will not disqualify the juror, if the opinion he has formed is merely a qualified one. *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545.

A juror is not disqualified by an opinion formed from hearing or reading the testimony of witnesses, or from hearing what purport to be the facts from persons in whom the juror has confidence, if the opinion is not in fact a decided one, and the juror believes that notwithstanding such opinion he can try the case fairly. *Pollard v. Commonwealth*, 5 Rand. 659; *Jackson v. Commonwealth*, 23 Gratt. 919; *People v. King*, 37 Cal. 507.

The fact that the juror says that it will take some evidence to remove his opinion is no disqualification so long as the opinion is a qualified one. *People v. King*, 37 Cal. 507.

In the following cases it was determined that jurors stating that they had formed opinions which it would take evidence to remove were nevertheless competent if they were able to say that they believed that notwithstanding such opinions they could try the case as impartially as if they had never

heard of it. *State v. Lawrence*, 38 Iowa, 51; *State v. Millain*, 3 Nev. 409; *Ortwein v. Commonwealth*, 76 Pa. St. 414, 18 Am. Rep. 420; *Wormeley's Case*, 10 Gratt. 658; *Grisson v. State*, 4 Tex. App. 374.

DAVIS, J.—The appellant was prosecuted for a violation of paragraph 675 of the Penal Code, which provides: "Every officer of this territory, or of any county, city, town, or district of this territory, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who, without authority of law, appropriates the same, or any portion thereof, to his own use, . . . is punishable by imprisonment in the territorial prison for not less than one nor more than ten years, and is disqualified from holding any office in this territory." The charging part of the indictment upon which the prosecution was based is as follows: "The said Peter R. Brady, Jr., on or about the 12th day of July, 1899, at the county of Pinal, territory of Arizona, and before the finding of this indictment, who was then and there an officer of said county of Pinal, to wit, county treasurer of said county of Pinal, and by virtue of his said office then and there by law was charged with the receipt, safe-keeping, and disbursement of the public moneys of said county of Pinal, and there acting in said office as such treasurer, did then and there willfully, feloniously, and without authority of law appropriate to his own use a part of the moneys intrusted to him as aforesaid, to wit, six thousand one hundred and ninety and eight one-hundredths dollars, lawful money and circulating medium of the United States of America; he, the said Peter R. Brady, Jr., well knowing that he was not entitled to the same." The indictment was demurred to on the grounds—1. That it does not substantially conform to the requirements of the Penal Code of the territory; and 2. That the facts stated therein do not constitute a public offense; and the demurrer was overruled. Upon the impaneling of the jury for the trial of the cause, a challenge was interposed by the defendant to a juror (P. H. Loss) for the existence of a state of mind on his part which would prevent him from acting in the case with entire impartiality. The juror was examined upon his *voir dire*, and the challenge was disallowed. There-

after the defendant exercised the full number of his peremptory challenges upon other members of the panel, and the juror named was sworn, and served in the trial of the case. A verdict of guilty was rendered. Motion for a new trial was made and overruled, and the defendant was sentenced to confinement in the territorial prison for a term of five years.

Two assignments of error are made by the appellant, one based upon the refusal of the trial court to sustain the demurrer to the indictment, and the other upon its refusal to allow the challenge for cause interposed to the juror P. H. Loss. We will consider first the ruling upon the demurrer, which involves the question of the sufficiency of the indictment. The requirement of the statute is that the indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. Pen. Code, par. 1457. It must also be direct and certain as regards (1) the party charged, (2) the offense charged, and (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Id., par. 1459. The statute further provides that no indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits. Id., par. 1467. Tested by these requirements, is the indictment sufficient in form, and do the facts stated constitute a public offense? The point is urged that there is no definite allegation that the defendant ever received, as public money, the sum which he is charged with having appropriated. The indictment intelligibly sets forth, however, that he was an officer of a class referred to in the statute; that his duty was to receive public moneys; that while acting as such officer (i. e. performing the duties of such office) he appropriated some of the moneys intrusted to him as such officer. If money is intrusted to a public officer in his capacity as such, he certainly receives it as public money, and he must surely have received it to have appropriated it to his own use. The point is, we think, merely technical. Against the sufficiency of the indictment it is also urged that "Pinal County" is the proper name of the political subdivision, and that there

is no such body politic or corporate as the "County of Pinal." There is no express provision of the statute that the name shall be "Pinal County," and the two forms of county designation are used interchangeably in both the Civil and Penal codes. The material part of the name is "Pinal," and for the purposes of an indictment either form of designation would equally satisfy the requirement of the law. The indictment gives to the offense charged the appellation of "fraudulent appropriation of public money," and it is contended that there is no such crime defined by the statute. The offense which paragraph 675 defines, and for which it prescribes a penalty, is given no specific name in the statute; and whether or not the pleader has aptly denominated it is immaterial. The acts constituting the offense, as defined by the statute, are sufficiently stated, and, even though the indictment failed to give the proper legal appellation of the crime, it would be a mere irregularity in matter of form, not tending to the prejudice of the defendant. *People v. Phipps*, 39 Cal. 326; *People v. Cuddihy*, 54 Cal. 53.

We come now to the consideration of the second ground of error, predicated upon the refusal to allow the defendant's challenge to the juror P. H. Loss. In his examination the juror stated that he had formed an opinion as to the guilt or innocence of the accused, which he still retained, and which it would require evidence to remove; that his opinion was formed from talking with various persons whom he thought knew the facts in the case, and from hearing a part of the testimony of one witness for the prosecution on a former trial; that he would want considerable more evidence than that testimony to come to a conclusion as to the guilt or innocence of the accused; that he would not be able to act or find a verdict on what he then knew; that he had been acquainted with the defendant for about twelve years, and had a friendly feeling toward him; that, if accepted as a juror, he could sit in the case, and determine it entirely by the evidence that would be introduced upon the trial, and would disregard any idea or opinion that he had previously obtained from any source; that he could act as a trial juror just as though he had never heard of the case. This was the substance of the juror's testimony on the *voir dire* inquiry. Can we say from it that the trial court erred in overruling the challenge for bias?

Perhaps upon no one question of civil or criminal practice have the decisions of courts been more inharmonious than upon the question of qualification or disqualification of jurors, arising from the formation or expression of opinion of the guilt or innocence of the accused. Our statute has prescribed a rule on the subject, which excludes a juror who has either formed or expressed an unqualified opinion. Pen. Code, par. 1629. An unqualified opinion is a fixed, settled, and abiding conviction as to the guilt or innocence of the defendant. An opinion less decided than this may also be sufficient of itself, or in connection with other proof, to exclude a juror, when it appears that it will prevent him from acting with entire impartiality. The rule laid down by Mr. Chief Justice Marshall in Burr's trial was, that "light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." In the case at bar it was disclosed by the examination of the juror that he had, to some extent, formed an opinion as to the guilt or innocence of the defendant, which he said it would require evidence to remove, but that he could sit in the case, and determine it entirely by the evidence that would be introduced upon the trial, disregarding his opinion and previously acquired ideas. There is nothing in the record to indicate the nature of the witness's testimony on the former trial, a part of which the juror had heard. Nowhere is it apparent from the examination that the juror had any prejudice against the defendant, and, so far as we can see, there was no such prejudgment of the case on his part as would prevent the juror from acting fairly and impartially. He evidently believed he could do so, and the opinion which he had was no more than a qualified or conditional one. It has been frequently held that a juror, stating he has formed an opinion as to the merits of a case, which it would take evidence to remove, is nevertheless competent if it appears that he can decide the case impartially, without reference to what he has heard or the opinion which he has formed. *State v. Morse*,

35 Or. 462, 57 Pac. 631; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *Ortwein v. Commissioners*, 76 Pa. St. 414, 18 Am. Rep. 420; *State v. Millain*, 3 Nev. 409; *State v. Lawrence*, 38 Iowa, 51. The challenge raised an issue of fact upon which the court had to determine whether the nature and strength of the opinion formed was such as would prevent the juror from acting with entire impartiality. The finding of the trial court upon that issue should not be set aside by the appellate court unless the error is manifest. "No less stringent rules," says Mr. Chief Justice Waite, "should be applied by the reviewing court in such case than those which govern in consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not, in law, be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court." *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244. The trial judge heard the statements of the juror, had the opportunity to observe his manner, temperament, intelligence, and personal peculiarities, as exhibited on his examination,—important factors in determining his qualification,—and ruled in favor of his competency. There is nothing in the record which would warrant us in disturbing that finding. The judgment of the district court is affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 722. Filed March 28, 1900.]

[60 Pac. 700.]

H. D. UNDERWOOD, Plaintiff and Appellant, v. J. K. BROWN, Administrator of the Estate of J. V. Weigle, Deceased, Defendant and Appellee.

1. EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—REJECTION—PRESUMPTION—PAR. 1113, REV. STATS. ARIZ. 1887, CONSTRUED.—In an action against an administrator on a note given by his decedent, where plaintiff charged that the claim, duly verified, was left with the attorney for the administrator, in accord-

ance with the notice to creditors, and that subsequently the claim was lost or destroyed, but does not state that the claim was approved, there is no presumption that the administrator approved the claim. If any presumption is indulged, it must be that either the claim was rejected or not acted upon, for the reason that paragraph 1113, *supra*, provides that "If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day."

2. **SAME—SAME—ACTION—LIMITATIONS—PAR. 1115, REV. STATS. ARIZ. 1887, CONSTRUED.**—When suit against an administrator on a claim against the estate was not brought until nearly eight months after it was presented and not acted upon, the plaintiff is not entitled to recover, as paragraph 1115, *supra*, provides that "When a claim is rejected either by the executor, or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator within three months after date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is forever barred."

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Ben Morgan, for Appellant.

As to the complaint stating a cause of action, see *Grant v. Cooper*, 5 How. (N. Y.) 423; *Summers v. Farish*, 10 Cal. 347; *Frazer v. State*, 106 Ind. 471, 7 N. E. 203; *Hillman v. Hillman*, 14 How. Pr.

Rochester Ford, for Appellee.

SLOAN, J.—The appellant, H. D. Underwood, brought suit in the court below against the appellee upon his complaint, which read as follows: "Plaintiff, complaining of defendant, for cause of action alleges: That he is the owner and holder of the following instrument in writing, commonly called a 'promissory note,' said instrument being in the following words and figures, to wit: 'Baltimore, Md., June 10th, 1897. Four months after date I promise to pay to R. G. Lurty the sum of \$400 (four hundred dollars), for value received, negotiable and payable without defalcation or discount, with interest from date at the rate of four per cent per annum.

JOHN V. WEIGLE.' Indorsed: 'R. G. LURTY.' That said promissory note was made, executed, and delivered by said Weigle to said Lurty at the date and place named therein. That thereafter said Lurty indorsed his name thereon, and delivered the same to plaintiff. That defendant, J. K. Brown, is the duly appointed, qualified, and acting administrator of the estate of said deceased. That heretofore, to wit, on or about the — day of November, 1897, he presented said claim, duly verified, and with the necessary vouchers, to said administrator at the law office of Charles Bowman in the city of Tucson, Arizona, designated by said administrator in his notice to creditors as the place at which all claims against said estate should be presented. That said claim was by said Bowman received with the promise that he would have the said administrator act upon the same, and file it with the probate court for further action. That said Bowman was at the time the attorney for said administrator. That plaintiff, relying upon the statement of said Bowman, and believing that he would do as he had promised, did not look after said claim subsequent to that time as closely as he otherwise would have done. That subsequently he ascertained that said claim had been lost or destroyed, and that the action taken thereon by the administrator could not be ascertained, when he immediately again presented said claim, duly verified, and with the necessary voucher, to said administrator, who indorsed thereon the following: 'The within claim, presented to Jas. K. Brown, administrator, Aug. 4th, 1899, for the first time, . . . of said deceased, rejected this 4th day of August, 1899, for the reason that same was not presented within statutory period. J. K. BROWN, Administrator.' That no part of the principal and interest of said promissory note has been paid, and the whole thereof is now due and unpaid. Wherefore plaintiff prays judgment against said defendant for the sum of \$400, with interest thereon from date at the rate of four per cent per annum, together with costs of suit." To this complaint the appellee demurred upon the ground that the facts stated did not constitute a cause of action. The demurrer was sustained by the court below, and from this order and the judgment dismissing the action the appellant has brought this appeal.

The complaint, in effect, charges that the claim sued upon

was presented to the administrator in November, 1897. The plaintiff charged that the claim, duly verified, was left with the attorney for the administrator, in accordance with the published notice, but that subsequently the claim as made out was lost or destroyed, so that the action of the administrator thereon could not be ascertained. He does not state that the claim was approved by the administrator, but the inference is that he neglected to inform himself as to the action taken by the administrator until August, 1899. We cannot, in aid of the allegations of the complaint, presume that the administrator approved the claim. If we should indulge in any presumption, it must be that either the claim was rejected or not acted upon, for the reason that paragraph 1113 of the Revised Statutes makes it obligatory upon the administrator, whenever he allows a claim, to present the same to the probate court for the latter's allowance or rejection. Had this been done, presumptively some record would appear, showing what disposition had been made of the claim by the probate court. Again, it is provided in said paragraph 1113 that "If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day." It was incumbent upon the plaintiff to have followed up the claim diligently, and to have ascertained promptly what disposition was made of it; for paragraph 1115 of the Revised Statutes provides that "When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is forever barred." The record discloses that suit was not brought until nearly eight months after its presentation. Even if it be granted that a court of equity has power, as argued by counsel for appellant, to relieve against this positively expressed penalty for a failure to bring suit within the required time, no facts appear in the complaint which make out a case for equitable relief. The judgment is affirmed.

Street, C. J., and Doan, J., concur.

[Civil No. 707. Filed March 28, 1900.]

[60 Pac. 696.]

CHARLES GOLDMAN, Administrator of the Estate of M. Wormser, Deceased, Defendant and Appellant, v. PEDRO SOTELO, Plaintiff and Appellee.

1. **CONTRACTS—SUITS BY OR AGAINST ADMINISTRATORS, ETC.—WITNESSES—COMPETENCY—PAR. 1865, REV. STATS. ARIZ. 1887, CONSTRUED.**—The statute, *supra*, provides that "In an action by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court." *Held*, that this statute leaves the competency of either party's testimony regarding such transaction to the sound discretion of the court, and no abuse of discretion is apparent in allowing plaintiff to testify to an oral contract with defendant's decedent when two other witnesses testified to the same facts.
2. **APPEAL AND ERROR—VERDICT—CONFLICT OF EVIDENCE—NEW TRIAL WILL NOT BE GRANTED.**—The appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence, when the testimony is conflicting, and there is any evidence to support the verdict.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellant.

The purpose and object of the statute (sec. 1865) is to place the plaintiff and the estate of Wormser on exactly the same footing. That, as Wormser cannot deny the plaintiff's version of statements and transactions between the plaintiff and the deceased, the plaintiff shall not testify in regard thereto, or, as some of the cases put it, "The mouth of one party being closed by death, the mouth of the other is closed by law." *Peck v. McKean*, 45 Iowa, 18; *Wilson v. Wilson*, 52 Iowa, 44, 2 N. W. 615; *Ballinger v. Conneble*, 100 Iowa, 121, 69 N. W. 438; *Newton's Ex. v. Field*, 98 Ky. 186, 32 S. W. 623.

Jerry Millay, and Paul R. Frost, for Appellee.

Section 1865 sanctions the admission of the surviving party's testimony "when called to testify thereto, by the opposite party, or required to testify thereto by the court." This leaves the question in the sound discretion of the court, and therefore is not the subject of error, in the absence of a gross abuse of discretion on the part of the court.

The rule in its strictest application only excludes the testimony of a "party," and where, as in this case, the transactions were testified to by third parties, it was not an abuse of discretion for the court to require the party himself to testify in regard thereto. *Starrett v. Burkhalter*, 68 Ind. 439; *Cochran v. Langmaid*, 60 N. H. 571; *Page v. Whidden*, 59 N. H. 511; *Pratt v. Elkins*, 80 N. Y. 198; *McKay v. Riley*, 135 Ill. 590, 26 N. E. 525; Rev. Stats. Ariz., par. 673; *La Duke v. Township of Exeter*, 97 Mich. 450, 37 Am. St. Rep. 357, 56 N. W. 851; *Müller v. James*, 86 Iowa, 243, 53 N. W. 227; *Smith's Appeal*, 52 Mich. 419, 18 N. W. 195; *Walker v. Hill's Exs.*, 22 N. J. Eq. 517; *Harvey v. Hillard*, 47 N. H. 553.

DAVIS, J.—The plaintiff, Pedro Sotelo, brought suit in the court below against Charles Goldman, as administrator of the estate of M. Wormser, deceased, to recover for labor and services, under the terms of an express contract alleged to have been made by him with the said Wormser in his lifetime. The cause was tried before a jury, and a verdict rendered in the plaintiff's favor for the sum of \$973, upon which the court entered judgment. The administrator appeals from the judgment and from the order overruling his motion for a new trial.

It is first complained of, as error, that the trial court permitted the plaintiff, over the objections of the defendant, to testify to transactions had with the decedent, Wormser. Upon this point the record clearly shows that the plaintiff was permitted to testify to the nature, terms, and performance of the verbal contract of employment claimed to have been entered into by him with the said decedent, and which was the basis of this action. Under the general rule which finds expression in the maxim that "The mouth of one party being closed by death, the mouth of the other is closed by the law," much of this testimony would have been inadmissible.

The question here, however, must be considered in the light of our statutory provision on the subject, which is as follows: "In an action by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court." Rev. Stats., par. 1865. An evident purpose of this statute was to leave the competency of either party's testimony regarding such "transaction" or "statement" to the sound discretion of the court. In the case before us the court exercised that discretion by overruling the objections of counsel, and thereby "requiring" the plaintiff to testify. The same facts were, however, testified to by two other witnesses; and, there having been no apparent abuse of discretion, there was no error in the court's ruling admitting the testimony complained of.

It is contended by the appellant that there is a material variance between the complaint and the evidence in this case, and the point is sought to be made that, while the plaintiff's pleading declared upon an express contract, the tendency of his proofs was to support an implied contract. The appellant's contention in this regard is not, however, sustained by the record. While at the beginning of the trial the plaintiff asked and obtained leave to amend his complaint so as to permit of a recovery upon a *quantum meruit*, such amendment was never in fact made, and the evidence throughout shows that the case was tried and submitted upon the theory of an express contract. Besides the plaintiff's own statement in relation to the matter, there was the testimony of two other witnesses tending directly to establish such a contract.

Upon the final proposition, that the verdict is contrary to the evidence, we need only say that there was some evidence presented to the jury in support of every allegation of the complaint essential to this recovery, except those allegations which were expressly admitted by the answer. The weight of the evidence and the credibility of the witnesses were matters peculiarly for the consideration of the jury, and of the lower court upon the motion for a new trial. The appellate court will not grant a new trial on the ground that the verdict

is contrary to the evidence, when the testimony is conflicting, and there is any evidence to support the verdict. The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 723. Filed March 28, 1900.]

[60 Pac. 702.]

GRANT A. AVERY et al., Defendants and Appellants, v.
PIMA COUNTY, Plaintiff and Appellee.

1. UNITED STATES PRISONERS—IMPRISONMENT IN COUNTY JAILS—MAINTENANCE—CONTRACTS—PROPER PARTIES TO MAKE—REV. STATS. U. S., SECS. 5539, 5547, AND REV. STATS. ARIZ. 1887, PARS. 397, 398, 2459, 2460, 521, 1972, CONSTRUED.—Sections 5539 and 5547 of the Revised Statutes of the United States provide that United States criminals imprisoned in the jail or penitentiary of any state or territory shall be under the control of the officers having charge of the same, and authorize the attorney-general to contract with the proper authorities having control of such prisoners for their imprisonment, subsistence, etc. *Held*, construing the Revised Statutes of Arizona, *supra*, that the supervisors are the authorities that have the control and management of the United States prisoners, and are the proper persons with whom the department of justice should make the contract.
2. STATUTORY CONSTRUCTION—WEIGHT TO BE GIVEN CONSTRUCTION OF STATUTE BY THOSE CHARGED WITH ITS EXECUTION.—The contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.
3. OFFICERS—SHERIFFS—EXTRA COMPENSATION—SEC. 1765, REV. STATS. U. S. CONSTRUED.—Even if the sheriff were to be considered as a United States officer, so far as concerns his care of United States prisoners in the county jail, yet under section 1765 of the Revised Statutes of the United States, providing that no person whose salary is fixed by law shall receive any additional pay for any service unless the same is authorized by law, he is not entitled to extra pay for the care of such prisoners beyond his regular salary as county sheriff.
4. SAME—SAME—SAME—COMPENSATION PROVIDED BY LAW CONCLUSIVE.—PARS. 496, 1972, 2447, 2457 (AS AMENDED BY ACT OF MARCH 19,

1891), REV. STATS. ARIZ. 1887, CONSTRUED.—The Revised Statutes, *supra*, define the duties of county sheriffs and prescribe their salaries. No provision of the statutes of Arizona authorizes payment to the sheriff for "caring for prisoners, whether United States prisoners or others. Where no compensation is by law attached to the office, the officer can recover none. Where a compensation is provided by law for an officer, it is conclusive, and the officer can recover nothing beyond it. Therefore, payment of a claim for "care of prisoners" is unauthorized.

5. BOARD OF SUPERVISORS—LIABILITY FOR MONEY WRONGFULLY PAID—GOOD FAITH—IMMATERIAL.—PAR. 383, REV. STATS. ARIZ. 1887, AND ACT 34, APPROVED APRIL 3, 1893, AMENDING SAME, CONSTRUED.—Act 34 of the eighteenth legislature, approved April 3, 1893, amending paragraph 383 of the Revised Statutes of Arizona of 1887, provides that whenever any board of supervisors shall, without authority of law, order any money paid, for any purpose, such supervisors and the party or parties in whose favor such order shall have been made shall be responsible for all such sums of money and twenty per cent additional thereon. Suit having been brought under this act against a board of supervisors to recover money wrongfully ordered paid by them, *held*, that the board of supervisors make all orders for payments of money at their peril, and are liable for money paid without authority of law, though they act in perfect good faith, believing that they were authorized to make such order.
6. CONSTITUTIONAL LAW—COURTS—DUTY—TO APPLY AND ENFORCE LAW—IF CONSTITUTIONAL, OPPRESSIVENESS IS IMMATERIAL.—When an act is plain and unmistakable in its language, and is free from objection on constitutional grounds, the courts are bound to apply and enforce it, however unjust, oppressive, or objectionable in policy it may be.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, and C. W. Wright, for Appellants.

Rochester Ford, for Appellee.

No provision of the statutes of Arizona or of the United States authorizes payment to the sheriff for "caring for prisoners," whether United States prisoners or others. *In re Kays*, 35 Fed. 288.

The sheriff is not entitled to extra compensation or reward

for doing that which is merely his duty. *Stockton v. Shasta*, 11 Cal. 113; *Shattuck v. Woods*, 1 Pick. 175; *McDonald v. Woodbury County*, 48 Iowa, 404.

The law will not tolerate the employment of a public officer to discharge his plain official duty at a compensation other or different from or in addition to the compensation given him by law for his official services. *Wilcoxson v. Andrews*, 66 Mich. 553, 33 N. W. 533; *State v. Silver*, 9 Neb. 85, 2 N. W. 215; *Hallman v. Campbell*, 57 Tex. 54; *Van Duzee v. United States*, 41 Fed. 571; *Mullett v. United States*, 150 U. S. 566, 14 Sup. Ct. 190.

An officer cannot recover extra compensation for incidental or collateral services which properly belong to or form part of the main office. An express contract to pay such extra compensation, or an express allowance of it, is void. Unless compensation by law is attached to the office, none can be recovered. Mechem on Public Officers, secs. 855, 862; *Eakin v. Nez Perces County*, 4 Idaho, 131, 36 Pac. 702.

Prisoners in the county jails are under the control of the board of supervisors. Rev. Stats., pars. 521, 2459, 2460.

Boards of supervisors are a creation of the statute, and their acts must find warrant in the law, either expressly or by fair implication. The power "to direct and control prosecution of all suits to which the county is a party" does not include power to compromise illegal claims because suit is threatened. *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727.

DOAN, J.—This is an action brought by Pima County, on a complaint by the district attorney, against defendant J. B. Scott, who was the sheriff of the county, as alleged, and the other defendants, who were members of and constituted the board of supervisors of the said county, to recover from them certain sums of money which said members were alleged to have ordered paid to said Scott, as sheriff, without authority of law. Judgment was given in the court below against defendant Scott and all the members of the board for the amount thus paid, and interest and costs, and for twenty per cent of the amount as penalty. Defendants appeal, and assign as errors that the court erred in finding the issues for the plaintiff and in holding that the evidence sustained the judgment.

The record shows that, on the several dates as given, defendant Scott presented to the said board of supervisors his demands against Pima County, as follows:—

“July 3rd, 1894. J. B. Scott, care U. S. prisoners.

For services in caring for U. S. prisoners during the fourth quarter of 1893..... \$168 35

“Oct. 1st, 1894. To care of thirty-seven U. S. prisoners during the second quarter of A. D.

1894 (eight hundred and sixty days' care, at 35 cents per day)..... 301 00

“Dec. 24th, 1894. To care of U. S. prisoners during the third quarter of 1894..... 254 00”

These demands were examined and allowed by said board, and ordered paid out of the county treasury; and thereafter, and prior to the institution of this action, the same were, on presentation, and by virtue of said order, paid out of the county treasury. The testimony of defendant Scott was, that “These demands were not for meals furnished prisoners. They were for services in caring for prisoners under an agreement with the board of supervisors. The U. S. prisoners were fed by the county by contract. No distinction was made as to the feeding between U. S. prisoners and other prisoners. They were fed by the same contract, without any distinction.” The record shows the following entry on the minute book of the board of supervisors: “On motion, all members voting ‘Aye,’ it is ordered that the sheriff of this county be allowed the sum of thirty-five cents per day for care of United States prisoners; such claims to be audited and allowed only upon payment by the United States for such care.” The record further shows that before defendant Scott was elected sheriff a representative of the department of justice of the United States entered into a contract with Pima County as follows: “In the matter of boarding, guarding, and caring for persons and prisoners confined in the county jail of Pima County under any order or process in the United States courts: Now comes Major Frank Strong, general agent department of justice, United States, and asks a reduction from the prices heretofore charged; and, the matter being considered by the board, it is ordered (all members voting ‘Aye’) that from and after December 1, 1888, until terminated by either party hereto, all persons serving sentence or awaiting

trial, persons detained by the government as witnesses, and all persons incarcerated by order of the U. S. court on any process whatever, shall be guarded, boarded, and cared for by the county of Pima, furnished with blankets, medical treatment by the county physician, and medicine, for the sum of one dollar per day for each person."

It is urged by the appellants that the Revised Statutes of the United States (sec. 5547) authorizes the attorney-general to contract with no one but the sheriff for the care, keeping, imprisonment, subsistence, and proper employment of United States prisoners, as the sheriff is the manager of the jail, and is the only person authorized by law to control such prisoners. This position is untenable, but, if sustained, would not avail to defeat this action. On this subject the United States Revised Statutes provide:—

"Sec. 5539. Whenever any criminal convicted of any offense against the United States is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subjected to the same discipline and treatment, as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such state or territory."

"Sec. 5547. The attorney-general shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined."

The Revised Statutes of Arizona provide:—

"Par. 397. The boards of supervisors in their respective counties have jurisdiction and power . . . to provide for the care and maintenance of the indigent sick, or the otherwise dependent poor of the county; . . . to purchase, receive by donation, or lease any real or personal property necessary for the use of the county prison; take care of, manage and control the same; . . . to cause to be erected and furnished a courthouse, jail, hospital, and such other public buildings as may be necessary . . . and to construct and establish a branch jail, when deemed necessary, at a point distant from the county seat.

"Par. 398. The supervisors must contract for all supplies for county institutions."

"Par. 2459. Persons confined in the county jail under a judgment of imprisonment rendered in a criminal action or proceeding, may be required by an order of the board of supervisors to perform labor on the public works or ways in the county.

"Par. 2460. The board of supervisors making such order may prescribe and enforce the rules and regulations under which such labor is to be performed."

"Par. 521. The sheriff may, under the direction of the board of supervisors, employ convicts who have been sentenced to imprisonment in the county jail at some labor or occupation for hire or otherwise, and shall account to the board of supervisors for any moneys received for convict labor, and pay the same to the treasurer of the county."

"Par. 1972. Sheriffs shall receive the following fees: For traveling, . . . collecting money, . . . ; for . . . and doing all other public business not otherwise provided for, the sheriff shall receive such sum as may be allowed by the board of supervisors, not to exceed annually, \$500.00. To be paid out of the county treasury upon the order of said board of supervisors. . . . For the safe-keeping of prisoners confined in jail or under guard, the sheriff shall be allowed to employ a jailer, whose compensation shall be fixed by the board of supervisors. For each guard necessarily employed in the safe-keeping of prisoners the board of supervisors shall allow such compensation as it deems proper."

These provisions of the statutes show that the supervisors are the authorities that have the control and management of the United States prisoners, so far as providing a jail for their confinement, jailers and guards for their safe-keeping, food, beds and bedding, medicines and medical attendance for them when sick, and their performance of labor when required, and are the proper parties to receive the proceeds of such labor, when any are realized, and would indicate that the supervisors of the county were the proper persons with whom the department of justice should make the contract. The fact that the department of justice has placed this construction upon the statute, and that it has been followed for many years, without any attempt of any other department of

the government to question its correctness, would bring the case within the rule generally recognized by our courts, that "the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." *United States v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 446, 31 L. Ed. 389; *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269; *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627; *United States v. Philbrick*, 120 U. S. 52, 7 Sup. Ct. 413, 30 L. Ed. 559; *Brown v. United States*, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; *Hahn v. United States*, 107 U. S. 402, 2 Sup. Ct. 494, 27 L. Ed. 527; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Edwards's Lessee v. Darby*, 12 Wheat. 206, 6 L. Ed. 603.

If, however, the construction were sustained, that the sheriff, by virtue of his being in charge of the jail and having the control of the prisoners, was the proper one for the department to contract with, it would not avail to defeat this action; for this change in the interpretation would only substitute him for the board of supervisors as a representative of the county, and the money would go through his hands into the county treasury. The United States only pays for the support of the prisoners. Since the amendment to paragraph 2457 of the Revised Statutes of Arizona by the act of March 19, 1891, the county furnishes such support. Before that time the sheriff provided the prisoners with necessary food, clothing, and bedding, for which he was allowed a reasonable compensation. Under that law the payment for the prisoners' support would properly have gone to the sheriff, whether the contract had been made by the department of justice with him or with the board of supervisors. But after the amendment of March 19, 1891, by which the county furnished the food, clothing, bed, bedding, medicine, and medical attendance out of the county treasury, the money paid by the United States would go into the county treasury, regardless of who may have been the representative of the county with whom the contract was made. It is undisputed (being established by the testimony of the defendant Scott) that the claim in this case was for "services in caring for U. S. prison-

ers," and that their support, including board, bedding, and medical attendance, was furnished by the county, without expense to the sheriff. The decision, therefore,—*In re Kays*, (D. C.) 35 Fed. 288,—that the United States, under the statute quoted, is obliged "to pay a just and reasonable compensation for such support, and nothing more," and that when that is paid or tendered it is the sheriff's duty to receive and keep such prisoners without any further pay, is conclusive of this question.

The point is raised in appellants' brief that paragraphs 2444 and 2457 of the Revised Statutes of Arizona apply only to prisoners committed under territorial laws, and that the right and duty of the sheriff to receive and keep United States prisoners must be derived from paragraph 2447 of the Revised Statutes of Arizona and section 5547 of the Revised Statutes of the United States, and that these authorize him to make the contract and keep the funds paid thereunder, as an emolument of his office. It is urged that, being responsible to the United States courts for the United States prisoners, the sheriff is, to some extent, a United States officer. It was decided by Mr. Justice Story in *Randolph v. Donaldson*, 9 Cranch, 86, 3 L. Ed. 665, that "For certain purposes and to certain intents the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, and the keeper to be a keeper of the United States. The sheriff is, in law, the keeper of the county jail, and the jailer is his deputy, appointed and removed at his pleasure." If we consider him as a United States officer, we find the manner in which the United States statutes contemplate cases of this kind plainly and distinctly set forth in section 1765 of the Revised Statutes of the United States: "No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation." Mr. Justice Brewer quoted this statute in a case similar to this, and said: "At the most, it can only be regarded as extra service cast upon him as an officer of the

government, and by reason of his official position, and as such there is no express provision of law for its compensation." *Mullett's Admx. v. United States*, 150 U. S. 566, 14 Sup. Ct. 190, 37 L. Ed. 1184. In commenting on this statute the United States supreme court said in *Hoyt v. United States*, 10 How. 109, 13 L. Ed. 348: "It cuts up by the roots these claims by public officers for extra compensation on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress. The prohibition is general, and applies to all public officers, or quasi-public officers, who have a fixed compensation." In *United States v. Saunders*, 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594, in delivering the opinion of the court, Mr. Justice Miller said of this act: "The purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which as such officer he may be called upon to render from receiving extra compensation, additional allowances, or pay for other services which may be required of him, either by act of Congress or by order of the head of his department, or in any mode added to or connected with the regular duties of the place which he holds." We think that the construction given to this statute in these cases is conclusive against any claim of the appellant in the case at bar, as based upon the United States statutes.

When we examine the provisions of the Arizona statutes upon this subject, we find: Paragraph 496: "The sheriff must . . . take charge of and keep the county jail and the prisoners therein." Paragraph 2457, as amended by the act of March 19, 1891: "The sheriff must receive all persons committed to the county jail of his county." Paragraph 2447: "The sheriff must receive and keep in the county jail any prisoner committed thereto by process or order issued under the authority of the United States until he is discharged according to law, as if he had been committed under process issued under the authority of this territory; provision being made by the United States for the support of such prisoner." Paragraph 1972, after enumerating the fees, mileage, per diem, and pay for various services allowed to the sheriff, provides: "For . . . and doing all other public business not

otherwise provided for, the sheriff shall receive such sum as may be allowed by the board of supervisors, not to exceed annually \$500.00. To be paid out of the county treasury upon the order of said board of supervisors." The last provision quoted is the only legislative act that refers or applies to pay for his keeping the jail or the prisoners therein, and as that service is "public business," and is "not otherwise provided for," the provision quoted does cover it completely, and constitutes payment in full for that service. As the statute provides that he shall receive United States prisoners as if committed under process of the territory, it means that as he must receive and keep territorial prisoners without any distinct pay therefor, beyond the salary provided in the law for "doing all other public business not otherwise provided for," he must likewise receive and keep United States prisoners without any further pay than that provided by the law just quoted. The territorial and state courts, without exception, have held that in such cases the courts can give no pay to public officers beyond that provided by the legislature. *Stockton v. County of Shasta*, 11 Cal. 113; *Board v. Bransom*, 4 Colo. App. 274, 35 Pac. 750; *Eakin v. Nez Perces County*, 4 Idaho, 131, 36 Pac. 702. No provision of the statutes of Arizona authorizes the payment to the sheriff for "caring for prisoners," whether United States prisoners or others. "To keep the county jail and the prisoners therein" is the statutory duty of the sheriff. He accepted the office burdened with the charge of the jail and the prisoners therein as one of its duties. The duty of receiving and keeping in the county jail any United States prisoner, as if he were a territorial prisoner, is a service cast upon the sheriff by paragraph 2447 of the Revised Statutes, as sheriff, "by reason of his official position, and there is no express provision of law for its compensation." Where no compensation is by law attached to the office, the officer can recover none. Where a compensation is provided by law for an officer, it is conclusive, and the officer can recover nothing beyond it. The payment, therefore, of the demands in question was without authority of law.

This action was brought under act 34 of the eighteenth legislature, approved April 3, 1893, which reads as follows:—

"An act to amend paragraph No. 383, Revised Statutes of the Territory of Arizona.

"Be it enacted by the legislative assembly of the territory of Arizona:

"Section 1. That paragraph No. 383, of the Revised Statutes of the Territory of Arizona, be and the same is hereby amended to read as follows: 'Paragraph No. 383. Its powers can be exercised only by the board of supervisors or by lawful agents and officers acting under their authority and authority of law. Provided, however, that whenever any board of supervisors shall without authority of law, order any money paid out of the county treasury for salary, fees, or for any other purpose, such supervisors and the party or parties in whose favor such order shall have been made, shall be responsible for all such sums of money and twenty per cent additional thereon, to be recovered as follows: The district attorney of such county is hereby empowered and it is hereby made his duty to institute suit in the name of his county against such supervisors and others or any number of them to enjoin the payment of such money (or in case the same shall have been paid, then to recover the same), with twenty per cent and lawful interest and costs, and when such district attorney is paid by fees, he shall receive said sum of twenty per cent, otherwise it shall be covered into the county treasury to the credit of the fund from which the order of allowance was made. And the court shall give judgment accordingly, and for interest and costs as in other cases. And such board shall have no power to dismiss, compromise or in any way control any suit instituted under the provisions of this section. And no bond shall be required of a county in such action, whether for costs or to obtain an injunction. Provided, further, that if any such district attorney shall for twenty (20) days, after request made by any taxpayer of such county, in writing, fail to institute such suit, then any taxpayer of such county may institute such suit in his or her own name and at his or her own cost, with the same effect as if such suit had been brought by the district attorney. Provided, the person or persons instituting such action or suit shall execute a bond with two or more good and sufficient sureties, made payable to the defendant or defendants in such suit or action, conditioned that if the plaintiff or plaintiffs in such

action shall fail to prosecute such suit or action with diligence and to effect, that the plaintiff or plaintiffs will pay all damages sustained by the defendant or defendants by reason of such suit or action and all costs incurred therein. And if such taxpayer shall prevail in such suit, the court shall allow such taxpayer costs and a reasonable attorney fee, not to exceed forty per cent of the amount recovered or saved to the county, as the case may be. And provided further, that any supervisor may relieve himself from responsibility under the provisions of this law by dissenting from such order and having his dissent entered on the minutes of the board at the time.'

"Sec. 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

"Sec. 3. This act shall take effect and be in force from and after its passage."

Paragraph 383 of the Revised Statutes originally read: "Its powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law; provided, however, that whenever any board of supervisors shall, without authority of law, order any money paid as a salary, fees, or for other purposes, and such money shall have actually been paid, the district attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit in the name of the county, against such person or persons, to recover the money so paid, and twenty per cent damage for the use thereof, and no order of the board of supervisors therefor shall be necessary in order to maintain such suit; and provided further, that when the money has not been paid on such orders, it is hereby made the duty of the district attorney of such county to commence suit, in the name of the county, for restraining the payment of the same, and no order of the board of supervisors therefor shall be necessary in order to maintain such suit. A county shall not be required to give any bonds in any action, nor in order to obtain an injunction." Paragraph 411, which was likewise affected by act 34, read: "Every officer, including each supervisor, who shall draw an unauthorized warrant, claim, or demand upon any county treasury in this territory, contrary to or without the authority of law, shall be liable to the county on his official bond personally and for the

amount thus directly paid out or disbursed on such warrant, claim, or demand, and the same may be recovered by an action against the person or persons so liable therefor, jointly or severally. It shall be the duty of the district attorney of the county to see that suit is brought in the proper cases for the enforcement of the provisions of this section. The vote of each supervisor upon every question, order, or matter acted on by them shall be recorded in the minutes of the board."

It is urged by the appellants that the defendants Avery, Samaniego, and Finley passed upon the demands in question in their official capacity; that their action was a judicial determination, arrived at from their view of the rights of the claimant, Scott, and the liability of Pima County for the amount claimed; that even if their decision was erroneous, and their allowance therefore no defense on the part of Scott, who received the money (on the ground that the act of a public officer in disposing of public money is void when beyond his authority or unsupported by the law, and no defense in behalf of the recipient thereof in an action against him for its recovery), nevertheless, as to them, for the reasons given above, the act should be construed to require that they knew or had means of knowing that the claim was invalid, and that their allowance was in bad faith, or by reason of culpable negligence in not having informed themselves of the plain provisions of the law,—in other words, that the penal provisions of this act should be construed to apply to the supervisors only in cases of violation of the plain provisions of the law, and not to cases involving the decision of intricate legal controversies, when well-informed men, exercising reasonable care and research, are liable to err. This is urged on the ground that any other construction would be unreasonable; that the supervisors owe it to the public to give to the duties of their office their best efforts and ability,—an honest determination of, and an earnest investigation into, the county affairs that come to their hands,—but that they cannot be expected to be infallible; and that it would be unjust to hold them liable for the pecuniary damages that might result from an honest mistake, in cases where their position compels them to decide upon contested legal rights or liabilities. This view of the case is plausible. It would seem reasonable to recognize a difference between a man who presents and presses a de-

mand of questionable legality, and who receives from the county the money thereon, to which subsequent adjudication decides him not to have been legally entitled, and the supervisors, who, in the line of official duty, are obliged to pass upon the claim, and who allow it because its rejection would subject the county to the expense of litigation, and they believe, on reasonable ground, that the claim is legal, and would, if rejected, be collected with costs by suit of law, and who are guided in their determination by an examination of the law as it appears to them, and the advice of the district attorney of the county, who is by law constituted their legal adviser. But there is no ground for construction. The act is plain and unmistakable in its language. Moreover, we had, prior to its enactment, a statute that affords the relief suggested. To attempt to place that construction on this act would be to deny the necessity of it. Before the passage of the act in question, paragraph 383 of the Revised Statutes gave the recourse mentioned, against the recipient of money allowed without authority of law, for the amount received, and the twenty per cent penalty; and paragraph 411 of the Revised Statutes gave recourse against the supervisors or other county officers who should draw an unauthorized warrant, claim, or demand contrary to, or without the authority of law, and made it the duty of the district attorney to see that these provisions were enforced by suit. The act of April 3, 1893, was enacted to amend the law as it then existed. Its only office—the only reason for its enactment—is to repeal, so far as supervisors are concerned, the provisions of paragraph 411, take them out of the more lenient and considerate provisions therein contained, and place them under the former provisions of paragraph 383, in exactly the same position as the man who presents the demand and receives the money. It does this in language too plain to be misunderstood,—too distinct and explicit to warrant any attempt at construction. The fact that it makes the supervisors warrant their infallibility, and indemnify the county against the result of any error they may commit, however excusable or unavoidable it may be, or however honest or diligent they may have been in the matter, does not enable the court to afford them any relief when proceeded against under this act. When an act is plain and

unambiguous, and if free from objection on constitutional grounds, the courts are bound to apply and enforce it, notwithstanding objections to its policy. *Leonard v. Wiseman*, 31 Md. 201. Nor can courts set aside a statute merely because it is absurd or unreasonable (*Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248); nor because it is unwise (*Merchants' etc. Barb-Wire Co. v. Brown*, 61 Iowa, 275, 20 N. W. 434). "Nor can a court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of citizens, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected by the constitution. Except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. While the parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power, except—first, as it may have been limited by the constitution of the United States; and second, as it may have been limited by the constitution of the state. A legislative act cannot, therefore, be declared void unless its conflict with one of these two instruments can be pointed out." Cooley on Constitutional Limitations, 164 et seq. As there is nothing in the act in question directly in conflict with any express provision of the constitution of the United States or the Organic Act of the territory, the courts are powerless to protect the supervisors against the penalties it pronounces, however unjust or oppressive they may be. The judgment of the district court is therefore affirmed

Street, C. J., and Sloan, J., concur.

[Civil No. 716. Filed March 28, 1900.]

[60 Pac. 722.]

**WILLIAM C. MILLER, Defendant and Appellant, v.
CHARLES L. DOUGLAS, Plaintiff and Appellee.**

1. **WATER AND WATER-RIGHTS—DIVERSION—CHANGING POINT OF—TRESPASS—ESTOPPEL.**—Where an appropriator of water has for more than six years maintained a diversion dam within and a ditch across the field of another, the owner of the field is estopped by his acquiescence from denying the appropriator's rights therein upon the ground that he is a trespasser.
2. **SAME—PUBLIC LANDS—ENTRY—SUBJECT TO EXISTING DITCH RIGHTS.**—One taking possession of unoccupied public land takes it subject to the condition in which he finds it as to rights of way for ditches used in connection with valid appropriations of water.
3. **PLEADINGS—DAMAGES—ISSUES—AMENDMENTS.**—Where the complaint set out facts and prayed for damages which had accrued up to 1898, and no amendment or supplemental complaint covering the year 1898 was ever filed, it was improper to receive evidence of any injury sustained in 1898, although an amendment, changing the amount of damages claimed, was filed by leave of the court after trial, to conform to the proofs.
4. **APPEAL AND ERROR—ASSIGNMENTS OF ERROR—MUST BE SPECIFIC—SUPREME COURT RULE 6, SUBD. 2, AND ACT 21, LAWS 1893, CONSTRUED—MARKS v. NEWMARK, 3 ARIZ. 224, 28 PAC. 960, FOLLOWED.**—Rule 6 (subd. 2) of the supreme court rules provides: "If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered as distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors." *Held*, an assignment of error, "that the court erred in overruling a motion for a new trial," is too general, and will not be considered, notwithstanding act No. 21, Laws 1893, provides that "Every motion for new trial shall specify generally the grounds upon which the motion is founded."
5. **SAME—JUDGMENT.**—The supreme court on appeal can render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained, or the damages to be assessed or the matter to be decreed is uncertain.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Modified.

C. S. Clark, Barnes & Martin, and Marcus A. Smith, for Appellant.

James Reilly, and William Herring, for Appellee.

STREET, C. J.—The appellee, Charles L. Douglas, brought an action in the district court of Cochise County against the appellant, W. C. Miller, and his wife, Jennie Miller, to recover damages for the loss of crops in the year 1897, and to obtain an injunction restraining defendants from interfering with a certain ditch through which plaintiff was diverting water to irrigate his lands. The case was tried to the court without a jury. Upon the hearing of the cause the defendant Jennie Miller was dismissed from the complaint, and judgment was entered by the court against the defendant William C. Miller for the sum of \$6,212.50 damages and costs of suit; whereupon the defendant filed his motion for a new trial, which was overruled, and defendant appealed to this court.

Plaintiff's complaint was filed on January 12, 1898, and alleged that ever since 1883 he and his predecessors in interest had been cultivating and farming one hundred and sixty acres of land in the Barbacomari Valley; that the same could only be cultivated by irrigation, and that by means of a dam in the Barbacomari Creek he conducted the water of said creek through a canal onto his land; that in December, 1896, the defendant, Miller, built a dam in the Barbacomari Creek, above plaintiff's ditch, and built a ditch across plaintiff's ditch, thereby filling it up, and depriving plaintiff of water during the year 1897, by reason whereof plaintiff lost his crops growing on said land for that year. The allegations were fully denied, and upon the trial the court made full findings of fact covering all the allegations in the complaint, as well as the result of the evidence upon many contested facts. Barbacomari Creek, during most of the year, and especially in the dry seasons, furnishes but a small amount of water at the place where plaintiff diverts water for his canal. During the flood seasons the banks of the creek are often rent and torn with the torrents. Plaintiff's land lies but a short distance below the old point of diversion, and had been in cultivation by himself and others for a great many years. It was cultivated formerly by a man by the name of Harria,

from whom Douglas purchased it. Harris made the first appropriation of water for the land, and sold his interest in the water appropriation and diversion and his interest in the canal to the plaintiff, Douglas, at a period so early that there can be no question, under the evidence in the record, about plaintiff's appropriation being prior to any appropriation of the waters of Barbacomari Creek made by the defendant, Miller, or any of his predecessors. The defendant, Miller, is the owner of the Brookline ranch, which was fenced and used for the purposes of pasture, principally, if not altogether, by his predecessor in interest, W. C. Land, since about the year 1883 or 1884. At the time the Brookline pasture was fenced by defendant's predecessor, Harris was already diverting water from the Barbacomari Creek. The Brookline pasture-field, as fenced by W. C. Land, lay on both sides of the Barbacomari Creek down to the point where Harris had made his diversion of the water. There is some conflict in the evidence as to whether the point of diversion was inside of the Brookline pasture-field or outside. Land says it was on the outside, just where his fence crossed the creek. At that place there was a natural pool, which had been formed in the creek-bed by reason of the roots of willow trees growing there in a clump and cluster. Plaintiff's ditch was so constructed that he made of the pool a sort of reservoir, so that, when irrigating his lands, he could get a stronger irrigating head than could be obtained by the steady flow of the water in the creek. In 1890 the floods of the rainy season changed the channel of Barbacomari Creek, leaving the pool and the point of diversion one thousand feet or more away from the new channel of the creek. Plaintiff then went up through the pasture-fields of the Brookline ranch, owned by W. C. Land, to about the place where the new channel connected itself with the old channel, and there built a dam in Barbacomari Creek, and constructed a canal from that point down through the Brookline pasture-field to plaintiff's ditch at the old point of diversion at the pool, and there joined the new canal on to the old, and by that means again diverted water from the Barbacomari Creek. The waters of the creek never regained the old channel between these two points, but have since continued to flow through the new channel around through a different portion of the Brookline pasture-field,

and away from plaintiff's land. The defendant, Miller, came into possession of the Brookline pasture-field in 1896, and soon after coming into possession made a diversion of the waters of the Barbacomari Creek above the new dam of the plaintiff, as located in 1890, and constructed a canal for himself, ran it through the Brookline pasture-field across plaintiff's ditch, and filled up plaintiff's ditch, and thereby prevented plaintiff from using his canal, or obtaining water from the Barbacomari Creek. Plaintiff's dam at the new point of diversion was a temporary structure,—a brush and rock dam,—and suffered destruction every year from the floods to the extent that its reconstruction was every year necessary. The government title to the Brookline pasture-field at the time of the acts complained of had not been obtained by the defendant, Miller. It was still government land, and Miller's rights to it were such rights as come from inclosure and possession. The two questions to which the attention of the court is directed, are: First, the extent to which the plaintiff committed trespass in going through the Brookline pasture-field, and constructing his canal, and building his dam on Barbacomari Creek within the pasture-field; and second, the question of damages under the pleadings and the evidence.

The position is assumed by the defendant that plaintiff had no right to go through the Brookline pasture-field; that every time he went into the field to reconstruct the dam he was a trespasser; and that, being a trespasser, the defendant could fill up plaintiff's ditch without being subjected to damages. It is conceded by the defendant that an appropriator of water can change his point of diversion, but it is denied that he can enter the inclosure of another for that purpose; and some argument has been made before the court and on brief as to what extent one may go upon the inclosure of another, while the same is public land, to make such new diversion. There is some conflict in the evidence as to whether the Brookline ranch from the time that W. C. Land inclosed it had been in the actual, or even the legal, occupation of any one during all the years up to the time defendant went into possession of it. Land claims that he was all the time in possession, and using it, until he sold it to Miller. If so, he and his successor are estopped by acquiescence. It is certain, under

the evidence, that Douglas built the canal through the Brookline ranch in 1890, and ever afterwards, up until he was disturbed, in December, 1896, maintained the canal and maintained the dam in the Brookline ranch. If Land was in possession of it, he had allowed all time to go by in which either he or his successor to him could complain. If he were not in possession, and the ranch was of the nature of unoccupied public land at the time Miller came into possession, it is clear that Miller would have to take it subject to the conditions in which he found it.

As to the question of damages, there is an assignment of error that "the court erred in finding damages which were excessive, fanciful, speculative, and remote, as appears by the findings and the evidence." If this assignment is sufficiently specific, it possibly can be maintained in the sixteenth finding, in which the court found that plaintiff's loss in the year 1897 was for alfalfa hay, \$3,562.50; loss of fruit trees, vines, berries, \$400; loss of garden vegetables, \$150; or a total of \$4,112.50. Loss for the year 1898: Alfalfa hay, \$1,900; cost of reseeding alfalfa, \$200; total, \$2,100,—making a total loss for the two years of \$6,212.50. Plaintiff's complaint was filed on January 12, 1898, and set out facts existing up to that time, and prayed for damages which had accrued up to that time. No amendment or supplemental complaint covering the year 1898 was ever filed. An amendment was made changing the amount of damages claimed, and was filed, by leave of the court, after trial, to conform to the proofs. Without pleadings covering the year 1898, it was improper to receive evidence of the injury sustained in 1898. Plaintiff undertook to place the damages arising in 1898 as a result of the acts of defendant in 1896 and 1897, and his evidence tends to show that his losses in 1898 were the result of the death of the alfalfa in 1897, from the acts of defendant committed in 1897. He recovered damages for the loss of alfalfa hay in 1897 because the alfalfa died. If he could recover for 1898 because of the same death, he could also recover for 1899, and so on. There can be but one loss, and hence one recovery only. Plaintiff obtained an injunction against acts of the defendant at the time of filing his action (January 12, 1898), which remained during the pendency of the action; thus precluding any interference on the part of defendant in 1898,

and making it conclusive that the damages assessed for 1898 were for the loss suffered in 1897, about which damages had been once assessed.

The appellee complains that the assignment of errors by the appellant should not receive attention of this court, because the specifications of the grounds of error are not sufficiently stated. We are disposed to criticise the appellant for the paucity of his statements under his assignments of error. They come quite close to the border line of being too general for consideration. The first assignment of error must receive our condemnation, which is, "That the court erred in overruling a motion for a new trial." In *Newmark v. Marks*, 3 Ariz. 224, 28 Pac. 960, this court refused to investigate the record to discover wherein the trial court erred, under the allegation of a general assignment of error. Our rules of court (rule 6, 4 Ariz. xi, 35 Pac. vii) provide that "all assignments of error must distinctly specify each ground of error relied upon, and the particular ruling complained of." Subdivision 2 of that rule provides: "If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered as distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors." Counsel relies on the statute in relation to motions for new trial, approved March 22, 1893, (Act No. 21, Laws 1893.) and says that, if the motion for a new trial is not required to be specific, an assignment of error which specifies the general grounds of the motion in conformity with the statute is sufficient. Even without the aid of our rule, we feel appellant's contention is untenable; but, inasmuch as the rule was adopted by the court after the act referred to was passed, the rule operates upon the statute in such a way as to make it necessary in the assignment of errors that "the court erred in overruling a motion for a new trial" to specify in what particular the court erred; all of which can be readily done without stating the argument necessary to be employed to sustain the assignment.

The court can render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damages to be assessed or the matter to be decreed is uncertain. In finding

that the court erred in assessing damages for 1898, it will not be necessary to resubmit the case to the district court for a new trial. The findings for damages for 1897 are specific, and fully sustained by the evidence, or at least supported by sufficient evidence to make it improper for an appellate court to disturb the judgment. It is the order of this court that the judgment be modified by striking out the sum of \$2,100, found by the district court to have been sustained by the plaintiff in the year 1898; that the case be remanded; and that the district court enter judgment in the case as thus modified.

Sloan, J., and Doan, J., concur.

[Criminal No. 143. Filed March 28, 1900.]

[60 Pac. 697.]

HENRY WILSON, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—MURDER IN SECOND DEGREE—VERDICT—DEGREE MISPELLED "DECREE"—DOES NOT VITIATE VERDICT—DOCTRINE *IDEM SONANS* APPLICABLE.—A verdict finding the defendant "guilty of murder in the second decree" is not void because it finds the appellant guilty of no offense known to the statute, as the words "decree" and "degree" are pronounced so nearly alike as to make the doctrine of *idem sonans* applicable, and the spelling does not render it uncertain.
2. SAME—SELF-DEFENSE—INSTRUCTION TO JURY—HARMLESS ERROR—NOT GROUND FOR REVERSAL.—While an instruction that "To justify the killing of another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary," may be erroneous, such error is harmless, and no ground for reversal when a later statement to the jury that "It is your duty to look to the transaction from what you believe from the evidence was the standpoint of the defendant at the time, and consider the same in the light of the facts and circumstances as you believe they appeared to the defendant at the time, and not from any other standpoint."

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Joseph Campbell, for Appellant.

There is no such crime as murder in the "second *decrees*." Act No. 17, 19th Leg. Assem. 1897.

It devolved upon the jury to find the degree of murder in their verdict. *People v. Campbell*, 40 Cal. 129; *People v. Jefferson*, 52 Cal. 452; *People v. Travers*, 73 Cal. 580, 15 Pac. 293; *People v. O'Neal*, 78 Cal. 288, 20 Pac. 705.

The verdict must be taken as it is written, and it is not competent to explain by evidence what the jury intended.

Where the defendant was found guilty of murder in the "first degree," the court held the verdict void. *Woolridge v. State*, 13 Tex. Crim. App. 443.

The case at bar is as strong as the case just cited. It cannot be said that the jury intended to find the defendant guilty of murder in the "second degree" any more than the verdict above cited could be explained to mean murder in the "first degree." A verdict sentencing defendant "at two years in the state penty" was held void. *Keller v. State*, 4 Tex. Crim. App. 527. So was a verdict finding defendant "guilty." *Taylor v. State*, 5 Tex. Crim. App. 570; *Wilson v. State*, 12 Tex. Crim. App. 485; *Harwell v. State*, 22 Tex. Crim. App. 255.

So also was a verdict finding a defendant guilty of "buggellary" instead of "burglary." *Haney v. State*, 2 Tex. Crim. App. 504.

The doctrine of *idem sonans* was not held to apply to either of these cases.

It is not the province of the court to ascertain and specify the offense of which the defendant is guilty. *People v. Ah Gow*, 53 Cal. 628.

An indictment charging a person with entering a stable with intent to commit "lacey" describes no offense. *People v. St. Clair*, 55 Cal. 524.

Where an indictment concluded "against the peace and dignity of the state of W. Virginia," instead of "West Virginia," the indictment was held void. *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293.

C. F. Ainsworth, Attorney-General, for Respondent.

"Degree" and "decree" are pronounced so nearly alike that it would require a practiced and careful ear to dis-

tinguish between them. This is the test of the application of the doctrine of *idem sonans*. *Gahan v. People*, 58 Ill. 160. The court said: "In the indictment the name is spelled 'Mary Danner,' while on the trial she testified it was spelled 'Dan-naher.' . . . Notwithstanding this difference in orthography, it is not apparent, that, without care and effort, a large majority would not pronounce them alike, or so nearly so that it would require a practiced ear to distinguish them." Held sufficient indictment.

In *Krebs v. State*, 3 Tex. App. 349, the verdict, which was upheld, read: "We the juror find the defendant guilty, and *sess* his punishment *deth*."

In *Hoy v. State*, 11 Tex. App. 32, the jury assessed the defendant's punishment at "two years in the state *penitenil-ery*." The court held the verdict good, saying: "Misspelling does not vitiate a verdict, when no doubt can be entertained as to the words intended, or as to their meaning."

In *McCoy v. State*, 7 Tex. App. 379, the verdict assessed the punishment "a five years in the state *prisin*." Held sufficient.

"*Gilty* of *mrder* in the first degree" held valid in *Walker v. State*, 13 Tex. App. 618.

In *Witten v. State*, 4 Tex. App. 70, a motion to quash an indictment because the name of the month mentioned in the indictment was written "Tebruary," was held to have been properly overruled.

In *Koontz v. State*, 41 Tex. 570, the verdict held good read: "We the jury find the defendant *gilty* as charged in the indictment, and assess his punishment at confinement in the state penitentiary for a *turm* of *too* years."

In *McMillan v. State*, 7 Tex. App. 100, the verdict upheld read: "We the jury, find the defendend guilty, and assess his punishment at five years *confindendment* in the peniten-tiatry."

DAVIS, J.—The appellant, Henry Wilson, was tried at the May term, 1899, of the district court of Maricopa County, upon an indictment charging him with the crime of murder. The jury returned its verdict in the following form: "We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths do find the defendant, Henry Wilson, guilty of murder in the second *decree*, and recommend him

to the mercy of the *cort*. F. W. BUTLER, Foreman." A motion for a new trial in the case was duly made and overruled, and the court pronounced judgment, sentencing the defendant to a term of fifteen years' imprisonment in the territorial prison. The defendant appeals from the judgment, and assigns two specific grounds of error upon which he relies for reversal.

It is first claimed that the verdict is void because it finds the appellant guilty of no offense known to the statutes,—“murder in the second *decree*.” Our statute now distinguishes murder into two degrees, and the determination of the degree is a matter for the jury, under the court’s instructions upon the law. In this case the degrees of the crime were clearly and accurately defined by the learned judge who presided at the trial, and the jury was fully instructed in regard to the rules of distinction between them. That there can be any doubt as to what was intended by the verdict does not seem to us even remotely possible. Bad spelling will not vitiate a verdict, where it has the requisites of being certain and intelligible. *Snyder v. United States*, 112 U. S. 216, 5 Sup. Ct. 118, 28 L. Ed. 697; *Koontz v. State*, 41 Tex. 570. But another principle is decisive of the question sought to be raised in the case before us. Words which may be sounded practically alike without doing violence to the power of the letters found in the variant orthography are *idem sonans*, as the books express it, and the variance is immaterial. Under the application of this rule, a verdict, “Guilty of *mansluder*,” has been held valid. *State v. Smith*, 33 La. Ann. 1414. “*Gilty of mrder* in the first degree” was held to mean “Guilty of murder in the first degree.” *Walker v. State*, 13 Tex. App. 618. A verdict finding “the accused guilty with assault by *sutinge* with intent to murder” was held sufficient to reasonably convey the idea intended, the word “*sutinge*” being *idem sonans* with “shooting.” *State v. Wilson*, 40 La. Ann. 751, 5 South. 52, 1 L. R. A. 795. “We, the *juror*, find the defendant guilty, and *sess* his punishment *deth*,” is not an invalid verdict. *Krebs v. State*, 3 Tex. App. 348. A verdict reading, “We, the jury, find the defendant guilty of an *aggravated* assault,” has been held to sufficiently convey the intent to convict the defendant of “aggravated” assault. *Lewallen v. State*, (Tex. Cr. App.) 24 S. W. 907. The words “*decree*”

and "degree" are pronounced so nearly alike that it would require a practiced ear to distinguish them, and this similarity of pronunciation must be held to make the doctrine of *idem sonans* applicable in testing the sufficiency of the verdict upon which the judgment appealed from was based.

It is contended that the court erred in giving to the jury the following instruction: "To justify the killing of another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further struggle before the mortal blow was given." This was one of several instructions which the court gave pertaining to the right of self-defense. Whether, as an abstract proposition, it correctly states the law of self-defense, has received considerable discussion from the bench. The identical instruction was approved in *People v. Nichol*, 34 Cal. 217, and *People v. Iams*, 57 Cal. 119, condemned in *People v. Flahave*, 58 Cal. 249, and subsequently sustained in *People v. Herbert*, 61 Cal. 544; *People v. Raten*, 63 Cal. 421; *People v. Guidice*, 73 Cal. 228, 15 Pac. 44; *People v. Bruggy*, 93 Cal. 483, 29 Pac. 26. The objection urged is that it ignores the right of the defendant to act upon apparent danger; but as was said in *People v. Bruggy*, *supra*, the natural and proper construction to be given it is that, "to justify the killing of another in self-defense, it must appear (to the defendant) that the danger was so urgent, etc., that the killing of the other was absolutely necessary." That the jury was not misled upon the point is manifest from the other instructions given in connection with the foregoing, in which the right of the defendant to act upon appearances was fully and clearly set forth. We refer particularly to the following portions of the court's charge: "The right of self-defense is not limited to cases or instances where actual danger exists. When a person apprehends that another is about to do him great bodily harm, and there is a reasonable ground to believe that the danger is imminent that such design will be accomplished, he may safely act upon such appearances, and even kill his assailant, if this be necessary to avoid the apprehended danger, and the killing will be justifiable, although it may

afterwards turn out that the appearances were false, and that there was in fact neither design to do him serious injury, or danger that it would be done." "In determining whether the defendant acted in necessary self-defense, or in what reasonably appeared to him to be in his necessary self-defense, it is your duty to look at the transaction from what you believe, from the evidence, was the standpoint of the defendant at the time, and consider the same in the light of the facts and circumstances as you believe they appeared to the defendant at the time, and not from any other standpoint. And it is for the jury to determine from the evidence what were the appearances to the defendant, and what his standpoint was, and in what light he in fact did view the facts and circumstances at the time." Taking the instructions upon the question of self-defense as a whole, we think the jury was properly directed as to the law. We find no error in the record, and the judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Criminal No. 141. Filed March 28, 1900.]

[60 Pac. 694.]

EDWARD LEWIS, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—EVIDENCE—DEFENDANT AS WITNESS—CROSS-EXAMINATION OF—EXTENT AND LIMITATION—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 2040, CONSTRUED.—Where the statute, *supra*, provides that "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the territory as to all matters about which he was examined in chief," it is error to compel a defendant who has testified in his own behalf concerning the circumstances of the killing and in relation to his movements immediately before and after the homicide to answer on cross-examination as to whether or not he had been previously convicted of other felonies.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

G. A. Allen, J. E. Morrison, and Herndon & Norris, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

DAVIS, J.—The defendant, Edward Lewis, was tried and convicted, at the June term, 1899, of the district court of Yavapai County, of the crime of murder in the first degree, and is under sentence of death. From the judgment of conviction he prosecutes this appeal. On the trial the defendant was placed upon the stand as a witness in his own behalf, and testified concerning the circumstances of the killing and in relation to his movements immediately before and after the homicide. Upon cross-examination, and against the objection of the defendant, the court permitted the district attorney to ask, and required the defendant to answer, the following questions: "Were n't you tried and convicted at Flagstaff, under the name of Lovell, for the crime of burglary?" "Were n't you sentenced by Judge Hawkins, here, to one year in the penitentiary?" "Is n't it true that you were tried, convicted, and sentenced by Judge Hawkins, at Tucson, for the crime of forgery, and that you served a term of eighteen months after that; that you escaped from the penitentiary, and were recaptured under the name of Ed Lewis?" These questions were asked for the purpose of affecting the credibility of the defendant as a witness. They were all answered in the affirmative, and no other evidence was offered relative to such former convictions. It is claimed that the court's ruling in allowing this cross-examination was an invasion of the defendant's legal rights, and prejudicial error, for the reason that the statute of the territory limits the cross-examination of a defendant in a criminal case to the matters about which he was examined in chief. The provision of our Penal Code in this regard is as follows: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the territory as to all matters about which he was examined in chief." Par. 2040. At common law the defendant in a criminal case was not a competent witness, and the constitution ordains that he shall

not be compelled to be a witness against himself. The rule of the common law which prevented the prisoner from testifying on his own trial was considered to be oppressive, and in nearly all of the states there is now some form of statute which permits the accused to be a witness in his own behalf, but shields him from any unfavorable presumption which his refusal to testify might create. In general, these enactments contain no restriction upon the cross-examination of the defendant as a witness, such a limitation being found only in the statutes of California, Oregon, Missouri, Louisiana, and Arizona. In those jurisdictions where the cross-examination of the accused is not by the statute expressly bounded by the examination in chief, it has been generally held that he occupies the same footing as any other witness when he takes the stand, although there is some eminent judicial authority to the contrary. "These statutes," said Judge Cooley, "confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance; and, if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise, the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger." Cooley on Constitutional Limitations, 5th ed., p. 386. In Massachusetts the provision is, that the accused "shall at his own request, and not otherwise, be deemed a competent witness." Pub. Stats. c. 169, sec. 18. Under this statute it has been held that when the defendant offers himself as a witness he waives all protection guaranteed by the constitution, and becomes a competent witness as to the whole case; which has induced the observation by a distinguished jurist that "confessions are thus forced from him with the sanction of the law, and the inquisition of torture is restored, only without the rack and thumbscrew." But it is conceded to be the general holding, in those states which impose no restriction upon the cross-examination of the accused, that impeaching questions of the character disclosed in this case violate no constitutional right. In Arizona, however, the

scope of the cross-examination of a defendant in a criminal case is restricted to the "matters about which he was examined in chief." It is not correct to say that this is merely a reiteration of the rule applicable to all witnesses; for witnesses, under the general rule, can, for various purposes, be asked concerning matters about which they had not been examined in chief. 2 Phillips on Evidence, p. 895 et seq. The limit of the cross-examination of ordinary witnesses is not marked with any great accuracy or distinctness, but the range and extent thereof is left to the discretion of the trial court, subject to the requirement that it must relate to facts pertinent to the issue, or which tend to discredit the witness or impeach his moral character. A cardinal rule of construction makes it the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed. *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431. If the legislature had intended to put a defendant in a criminal case, testifying for himself, upon the same footing as other witnesses, it could easily have signified that intention in one of two ways—First, by saying nothing about it; or, second, by saying, affirmatively, that he should be subject to cross-examination as other witnesses. But the language of our code is, that he may be cross-examined "as to all matters about which he was examined in chief," and either these words are entirely without signification, or else they prescribe a definite boundary within which the cross-examination of a defendant must be confined. That the latter is the true construction seems to us quite clear.

The statute of Oregon, which permits a defendant to offer himself as a witness in his own behalf, provides that the offer, when so made, "shall be deemed to have given to the prosecution a right to cross-examine him upon all facts to which he has testified tending to his conviction or acquittal." Laws 1880, p. 28. In *State v. Saunders*, 14 Or. 300, 12 Pac. 441, the supreme court, discussing a similar question under that statute, said: "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evi-

dence against him, and conduce more to his conviction, than direct testimony of his guilt in the particular case. Every lawyer who has had any considerable experience in criminal trials knows this,—knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. Ordinary jurors are not liable to care about such a party's guilt or innocence in the particular case, if they think him a scapegrace or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they must disregard the evidence except so far as it tends to impeach the testimony of the party; but what good would that do? . . . The legislature of this state evidently believed, when it adopted the act referred to, that the cross-examination of the defendant as a witness should be restricted. No one will claim who reads the act but that such restriction was intended. The question, however, is as to how far it extends. Counsel for the state insist that it extends no further than to prevent the prosecution from compelling the defendant to be a witness against himself; that he may be required to answer any question that will cast discredit upon his testimony without overstepping the limit imposed by the legislature. But how can he testify to his own infamy, as we have shown, without prejudicing his defense, and furnishing an argument in favor of his guilt? If he were shown to be a person who had been guilty of similar acts, whose history was marked by a career of crime, and who had been a constant violator of the law, would it not render it more reasonable that he was guilty in the particular case? And why not follow the plain reading of the statute and its obvious meaning? It says that when the accused offers his testimony as a witness in his own behalf he 'shall be deemed to have given to the prosecution a right to cross-examine him upon all facts to which he has testified.' There is no mistaking the intention of the legislature in the matter. It permitted a defendant in a criminal prosecution to be a witness in his own behalf, and subjected him to a cross-examination as to the facts to which he would testify, and the courts cannot extend the right beyond that."

The law of Michigan formerly contained a provision that the "defendant shall be at liberty to make a statement to the court or jury, and may be cross-examined on any such statement." Act 1861, No. 125. In *People v. Thomas*, 9 Mich. 321,

it was held that a cross-examination on such a statement would not be allowed to go beyond it,—could not extend over the entire issue, as it might if he were a general witness, or into any of the collateral inquiries, whereby a witness's credit or memory is sometimes tested.

The Missouri statute on this point provides "that no person on trial or examination . . . shall be required to testify, but any such person may, at the option of the defendant, testify in his own behalf or on behalf of a co-defendant, and shall be liable to cross-examination as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case." Rev. Stats. 1879, sec. 1918. Under this statute, which would appear more favorable to the right of cross-examination than that of Arizona, it has uniformly been held that the cross-examination of the accused must be limited to those matters referred to in his direct examination, and if extended beyond that will justify reversal. *State v. Chamberlain*, 89 Mo. 129, 1 S. W. 145; *State v. McLaughlin*, 76 Mo. 320; *State v. Turner*, 76 Mo. 350; *State v. Porter*, 75 Mo. 171; and *State v. McGraw*, 74 Mo. 573. In both *State v. McLaughlin* and *State v. Turner*, *supra*, the ground of reversal was the cross-examination of the defendant as to matters and crimes not testified to in his examination in chief, and in *State v. McGraw* it was held reversible error to permit the defendant to be asked if he had not been before convicted and sent to the penitentiary.

The Penal Code of California contains the same provision as that of Arizona respecting the scope of the defendant's cross-examination, and its effect, as there construed, is to take away from the court any discretion which it might ordinarily exercise in allowing the range of cross-examination to extend beyond the matter brought out upon the direct examination, and to prevent the prosecution from questioning the defendant upon the case generally, and, in effect, making him its own witness. *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80. But it has been decided in California that, for the purpose of affecting his credibility, the defendant in a criminal case may be asked whether he has not been convicted of a prior felony. The decision, however, is put upon the ground that the governing statute is another section, not contained in our code, which provides that, for the purpose of impeaching a witness,

"It may be shown by the examination of the witness . . . that he has been convicted of a felony." *People v. Johnson*, 57 Cal. 571; *People v. Crowley*, 100 Cal. 478, 35 Pac. 84. Prior to the enactment of this latter provision, such proof could only be made by the record of the judgment. *People v. McDonald*, 39 Cal. 697; *People v. Reinhart*, 39 Cal. 449. It is to be observed that in the more recent case of *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591, the court expresses doubt as to the correctness of the rule enunciated in *People v. Johnson*, 57 Cal. 571.

We think that the cross-examination complained of in the case at bar was a clear invasion of the right intended to be secured to the defendant by paragraph 2040 of the Penal Code, and that the same was highly prejudicial to him on the trial. For this error the judgment of the district court will be reversed, and the cause remanded for a new trial.

Street, C. J., and Doan, J., concur.

[Civil No. 727. Filed March 28, 1900.]

[60 Pac. 879.]

JOHN REID, Plaintiff and Appellant, v. F. A. KLEYEN-
STAUBER et al., Defendants and Appellees.

1. MORTGAGES—DEFECTIVE ACKNOWLEDGMENT—NOTICE—CONSTRUCTIVE—
SUBSEQUENT LIENOR—PRIORITY OF—PAR. 2601, REV. STATS. ARIZ. 1887, CONSTRUED.—Under the statute, *supra*, providing that "all deeds of trust and mortgages whatsoever which shall hereafter be made and executed shall be void as to all creditors and subsequent purchasers for value without notice, unless they shall be acknowledged or proved and filed with the recorder to be recorded, as required by law," one who acquired a lien on the property subsequent to the execution of a defectively acknowledged mortgage, and who has had no notice of the same, save and except such notice as the recording thereof imparts, is entitled to precedence as a prior lienor in an action to correct such defect and foreclose the mortgage.
2. SAME—SAME—CORRECTION—NOT RETROACTIVE—PARS. 2601 AND 2621, REV. STATS. ARIZ. 1887, CONSTRUED.—Paragraph 2621, *supra*, provides: "When the acknowledgment or proof of the execution of any instrument in writing may be properly made, but defectively

certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate. This statute in connection with par. 2601, *supra*, must be construed not as permitting a defective certificate of acknowledgment to be amended so as to relate back and give constructive notice from the time of the recording of such instrument, but only as affording a remedy for the correction of such defective certificate so as to make it effective as notice against all purchasers, encumbrancers, and creditors from the time the defect be cured.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

F. B. Laine, for Appellant.

E. J. Edwards, and Moorman & McFarland, for Appellees.

SLOAN, J.—The sole question presented by the record in this case is: In a suit to foreclose a mortgage on real estate, defectively acknowledged, in which the complaint sets forth the mistake of the notary in certifying such acknowledgment, and prays that the defective certificate be corrected, is it error for the court to decree such foreclosure, and allow the certificate to be amended, and yet to decree a judgment lienholder, made a party defendant, who has obtained his lien subsequent to the execution of the mortgage, and who has had no notice of the same, save and except such notice as the recording of such defectively acknowledged mortgage imparted, to have precedence, as a prior lienor, and to be entitled to have his lien first paid from the proceeds of the sale of the mortgaged premises?

Paragraph 2601 of the Revised Statutes provides: "And all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved and filed with the recorder, to be recorded, as required by law. . . ." Paragraph 2621 provides: "When the acknowledgment or proof of the execution of any instrument in writing may be properly made, but defectively certified, any party interested

may have an action in the district court to obtain a judgment correcting the certificate." We construe the former paragraph of the statute to mean, as it reads, that only such instruments named as shall be acknowledged, proved, or certified in the manner provided by law shall, by being filed for record, impart notice to subsequent purchasers, encumbrancers, and creditors, and then only from the time when all those provisions of the statutes have been fully complied with. In the light of the former statute, we construe the latter, not as permitting a defective certificate of acknowledgment to be amended so as to relate back and give constructive notice from the time of the recording of such instrument, but only as affording a remedy for the correction of such defective certificate so as to make it effective as notice against all purchasers, encumbrancers, and creditors from the time the defect be cured. In other words, the decree of the court correcting such certificate is not to be retroactive in its effects, so as to give the instrument force and effect as notice from the time it may have been filed for record, but only from the time when it shall be reformed. The California cases cited by counsel for appellant in his brief involve a construction of similar statutes, but are not in point, for the reason that in none of the cases cited was involved the right of a third person who had acquired a lien subsequent to the execution and recording of the instrument, and the reformation of the defective certificate of acknowledgment. The judgment is affirmed.

Street, C. J., and Davis, J., concur.

[Civil No. 720. Filed March 28, 1900.]

[60 Pac. 870.]

CHARLES G. JOHNSON et al., Defendants and Appellants, v. C. L. CUMMINGS, Plaintiff and Appellee.

1. **APPEAL AND ERROR—CONFLICT IN EVIDENCE—FINDINGS—WILL NOT BE DISTURBED.**—The appellate court will not disturb the findings of the trial court, where there was abundance of evidence to support the findings and it cannot be said that they are wrong.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Appellants.

Charles S. Clark, for Appellee.

STREET, C. J.—The appellee brought suit in the district court of Cochise County to recover judgment against Julius Cæsar on a promissory note executed December 13, 1895, for the sum of three hundred dollars, and to foreclose a chattel mortgage given to secure the debt. Appellant, Charles G. Johnson, was made a defendant, under the allegation that he claimed some interest in the property. Johnson set up a claim to the property by virtue of a bill of sale of the property covered by the mortgage, dated December 11, 1895, in which was expressed the consideration of one dollar, and other good and valuable considerations. The cause was tried to the court without a jury, and much evidence was introduced, both to establish and to disprove the claim of Johnson to the property. The finding of the court in that particular was "that the bill of sale, as set forth in the answer of the defendant Charles G. Johnson to the plaintiff's complaint, was executed by defendant Cæsar without consideration, and is void as a conveyance of any part of the mortgaged property as set forth in plaintiff's complaint, and that said defendant has no interest in said mortgaged property in law or equity." And further in that behalf, as a conclusion of law, the court found "that the bill of sale set forth in the answer of defendant Charles G. Johnson to a portion of the personal property described in plaintiff's complaint was executed without consideration, and the same is void as a conveyance."

Appellant's assignments of error all relate to the finding of the issues for the plaintiff and against the appellant, Johnson, and in finding that he had no interest in the property, in law or equity, and that the bill of sale was without consideration. We have looked into the testimony, and we cannot say that the district court was wrong in its findings, but it is possible the findings were the logical sequence of the evidence.

We can say that there was abundance of evidence to support the findings, and, that being the case, the rule of this court is too well settled for us to disturb the findings or reverse the judgment. The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 709. Filed March 28, 1900.]

[60 Pac. 895.]

**GEORGE SCHUERMAN et al., Defendants and Appellants,
v. TERRITORY OF ARIZONA, Plaintiff and Appellee.**

1. BONDS—COUNTY—FUNDING—TERRITORIAL ACT, MARCH 19, 1891, CONSTRUED—BRAVIN v. MAYOR, 6 ARIZ. 212, 56 PAC. 719, AND YAVAPAI COUNTY v. McCORD, 6 ARIZ. 423, 59 PAC. 99, FOLLOWED.—Under the territorial act of March 19, 1891, providing that "any person holding bonds, warrants, or other evidence of indebtedness of the territory or any county, municipality, or school district within the territory . . . may exchange the same for the bonds issued under the provisions of this act," it was the duty of the commissioners to fund the outstanding indebtedness of the county upon a demand from the holders, although no such demand was made by the county board of supervisors.
2. SAME—SAME—SAME—LOAN COMMISSIONERS — POWERS OF — ACT OF CONGRESS, JUNE 6, 1896, CONSTRUED—GAGE v. McCORD, 5 ARIZ. 227, YAVAPAI COUNTY v. McCORD, 6 ARIZ. 423, 59 PAC. 99, FOLLOWED.—The limit of January 1, 1897, mentioned in the act of Congress of June 6, 1896, authorizing the funding of all obligations outstanding, was intended to be restrictive only of the indebtedness which could be funded, and made the act applicable to that time, but did not terminate on that date the authority of the territorial officers to fund said obligations.
3. SAME—SAME—SAME—SAME—JOINT AUTHORITY—AUTHORITY OF MAJORITY—PAR. 2932, SUBD. 2, AND TITLE 31, REV. STATS. ARIZ. 1887, AS AMENDED BY ACT OF CONGRESS, JUNE 25, 1890, CONSTRUED.—Under subdivision 2 of paragraph 2932, *supra*, providing that "All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons, unless it shall be otherwise expressly declared in the law giving the authority," the funding of bonds by the board of loan commissioners at a meeting of such

board at which only two members of such board were present, the third being out of the territory, was valid, the Funding Act of 1887, as amended by Congress in 1890, being a territorial act and directly affected by subdivision 2 of paragraph 2932, *supra*.

AFFIRMED. 184 U. S. 342; 46 L. Ed. 580.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Reese M. Ling, District Attorney, for Appellants.

The board of loan commissioners was created by the act of Congress of June 25, 1890, by the use of the following language: "For the purpose of liquidating and providing for the payment of the existing and outstanding indebtedness of the territory of Arizona and such future indebtedness as may be or is now authorized by law, the governor of said territory, together with the territorial auditor and territorial treasurer, and their successors in office, shall constitute a board of commissioners, to be styled the loan commissioners of the territory of Arizona, and shall exercise powers and perform the duties hereinafter provided."

A board of this character could not act through a majority of its members in the absence of the other member, and any act performed at such a meeting is void.

The rule, as stated by Chancellor Kent, is, "that in matters of public trust or powers conferred for public purposes, if *all meet*, the acts of a majority will bind."

In *People v. Coghill*, 47 Cal. 361, the court, in passing upon the acts of two out of three commissioners under a statute providing for the appointment of three, held: "Where the act itself did not provide that a majority of the board shall constitute a quorum, the acts of two of the board were clearly illegal, even though the third had written that he did approve the action of the majority."

In the case of *First National Bank of North Bennington v. Mt. Tabor*, 52 Vt. 87, 36 Am. Dec. 735, the court cites with approval the case in 47 Cal. 361, above mentioned, and states the rule as follows: "The general rule in matters of public interest, the majority of those upon whom the power is con-

ferred is recognized, provided when all meet and confer, but not when the minority is ignorant of the transaction and has no legitimate opportunity to exercise its influence in the deliberations; or when the act in its terms requires the presence and concurrence of all."

Sutherland on Statutory Construction says: "Where any number of persons are appointed to act in a public manner they must all confer, but a majority may decide."

The same rule is laid down in the following cases: *Crocker v. Crane*, 21 Wend. 218, 34 Am. Dec. 228; *Babcock v. Lamb*, 1 Cow. 238; *Ex parte Rogers*, 7 Cow. 526; *McCoy v. Curtice*, 9 Wend. 17, 24 Am. Dec. 113, and note; *Green v. Miller*, 6 Johns. 41, 10 Am. Dec. 312.

C. F. Ainsworth, Attorney-General, for Appellee.

By direct statutory enactment in Arizona, where a board of officers consists of three or more the majority of the board may meet and act; therefore the funding of these bonds was legal. Rev. Stats., sec. 2932, subd. 2.

The act of funding the bonds was a mere ministerial act. When a *ministerial* power is conferred on a public board, only a majority of the board need meet and act. *Utter v. Franklin*, 172 U. S. 417, 19 Sup. Ct. 183.

In cases where it is held that all the members of a public board must meet and then a majority may act, it is held sufficient if all the members are notified of the meeting, even though they do not attend; and where there is nothing of record to show that all were not notified it will be presumed that all were notified. *People v. Walker*, 23 Barb. 312; *William v. School Dist. No. 1*, 21 Pick. 75, 32 Am. Dec. 243; *Horton v. Garrison*, 23 Barb. 176; *McCoy v. Curtice*, 9 Wend. 17, 24 Am. Dec. 113, and note; *Yates v. Russell*, 17 Johns. 468.

STREET, C. J.—The appellants constitute the board of supervisors of Yavapai County. The territory, by Charles F. Ainsworth, its attorney-general, on the second day of September, 1899, obtained from the district court an alternative writ of *mandamus* against the defendants, members of said board, requiring them to levy and assess upon the taxable property of the county of Yavapai the sum of thirty-two cents on each one hundred dollars valuation for the years 1898 and

1899, and the sum of thirty-seven cents on each one hundred dollars of valuation for the year 1900, for the purpose of paying interest on two hundred and fifty-eight territorial funding bonds, of the denomination of one thousand dollars each, issued by the territorial loan commission on the seventeenth day of September, 1897. Upon the return of the writ and the filing of defendant's answer, a statement of facts was submitted, which statement of facts the court adopted as its findings; and, as a result arising from the conclusions of law and the findings of fact, judgment was rendered for the plaintiff, and defendants were required to make such levy for the years 1898, 1899, and 1900. The defendants appeal, and present to this court three questions for consideration: "First. Were said bonds legally funded, without any demand from the board of supervisors of Yavapai County upon the territorial loan commission for such funding? Second. Could said bonds be legally funded after January 1, 1897? Third. Were said bonds legally funded at a meeting of said board of loan commissioners of the territory of Arizona, at a meeting at which only two members of said board were present; the third member being absent from the territory, and not in any manner consulted with reference to such funding?"

The history of these bonds is fully set out in former decisions of this court, to wit: *Gage v. McCord*, 5 Ariz. 227, 51 Pac. 977; *Coconino County v. Yavapai County*, 5 Ariz. 385, 52 Pac. 1127; *Yavapai County v. McCord*, 6 Ariz. 423, 59 Pac. 99. The first and second questions presented for our view in this case were therein discussed and settled, as also in the case of *Bravin v. City of Tombstone*, another territorial funding bond case, reported in 6 Ariz. 212, 56 Pac. 719. The district attorney for Yavapai County gracefully admitted the binding force of these decisions, but invited the court's attention again to the questions, because of the grave results embodied in their solution. The discussion of those questions in his brief is full and explicit, but a study of it does not enable this court to change its views upon the questions referred to. In those cases this court held that the bonds were valid; that they were regularly issued; that a demand from the holders of the bonds was sufficient, without a demand from the municipal authorities. We also held that the limit of January 1, 1897, mentioned in the act permitting the refunding of bonds, was

intended to be restrictive only of the indebtedness which could be funded, and made the act applicable to such obligations as existed and were outstanding prior to that time, but that it did not terminate on that day the authority of the territorial officers to fund said obligations.

The third question: "Were said bonds legally funded at a meeting of said board of loan commissioners of the territory of Arizona, at a meeting at which only two members of said board were present; the third member being absent from the territory, and not in any manner consulted with reference to such funding?" is answered by our statute (par. 2932, subd. 2): "All words purporting to give a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority." The case cited by appellants (*People v. Coghill*, 47 Cal. 361), in which it was held that two members of the board of commissioners were not legally empowered to act in the absence of the third, is not in point; for it was the provision of that act that "the board of supervisors to whom the report shall be made, shall appoint three commissioners, who shall jointly view and assess upon each and every acre to be reclaimed or benefited thereby," etc. There is no provision in the Funding Act of 1887, as amended by Congress in 1890, that the commissioners should jointly act, but the board was treated as a unit. The Funding Act is not strictly a Congressional act. It is a territorial act passed by the legislature of the territory, and embodied in the Revised Statutes of 1887. For the purpose of assuring the validity of the act, and of placing any issuance of bonds under it beyond dispute, the act was presented to Congress for its affirmative approval, which it gave with some few amendments, generally verbal in their nature, and evidently for the purpose of making the act more specific. The title of the act passed by Congress clearly carries out that view, for the first provision of that act is "that the act of the Revised Statutes of Arizona of 1887, known as title XXXI, 'Funding,' be and is hereby amended so as to read as follows; and that as amended the same is hereby approved and confirmed, subject to future territorial legislation." The act being a territorial act, and the commission being the creation of the territory, it is directly

affected by paragraph 2932, *supra*. The judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 711. Filed March 28, 1900.]

[60 Pac. 880.]

P. J. MYERS et al., Defendants and Appellants, v. FARMERS AND MERCHANTS' BANK, a corporation, Plaintiff and Appellee.

1. **APPEAL AND ERROR—RECORD—MINUTE ENTRY OF EVIDENCE OFFERED NOT PART OF—LAWS OF ARIZ. 1897, ACT NO. 71, SEC. 2, CONSTRUED.**—Section 2 of act No. 71, *supra*, provides that when an appeal or writ of error is taken the clerk shall certify, among other things, all minute orders in the case. A recitation of what testimony was introduced is not a minute order within the meaning of the statute, and is not intended to take the place of a statement of facts or a transcript of the evidence provided for by section 1 of said act.
2. **SAME—SAME—EVIDENCE—SUFFICIENCY—ADMISSIBILITY.**—This court cannot review questions presented by assignments of error as to the admissibility and sufficiency where the only record is a minute entry of the clerk, stating that the plaintiff introduced certain evidence, rested, and the cause was submitted; for even if it is to be considered as a part of the record, it does not show that defendants objected to the admission of such evidence or that other or further evidence was not introduced by plaintiff.
3. **SAME—SAME—BRIEFS—AGREED STATEMENT OF FACTS—MUST BE APPROVED BY TRIAL COURT.**—The agreement of both appellee and appellants in their briefs as to the evidence does not afford grounds for review, as even an agreed statement of facts cannot become a part of the record of any cause on appeal, unless such agreed statement shall have first received the approval of the trial court.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Kibbey & Edwards, and Baker & Bennett, for Appellants.

W. J. Kingsbury, for Appellee.

SLOAN, J.—We are asked to reverse the judgment in this case upon two grounds: First, that the court erred in admitting in evidence a certain verified account, which was appended to and made a part of the complaint filed in the cause; second, that the court erred in rendering judgment for the appellee and against the appellants without other evidence than said verified account and a certain original instrument, also appended to and made a part of the complaint. An inspection of the record discloses that this appeal was taken under the provisions of act No. 71 of the Laws of 1897. No bill of exceptions, statement of facts, or transcript of the evidence is in the record. There is a minute entry, made by the clerk, and brought into the record, to the effect that "The plaintiff, to sustain the issues on its part, offered in evidence certain documents, to wit, an agreement filed as 'Plaintiff's Exhibit A,' also an account as set forth in the plaintiff's complaint herein filed, and marked as 'Plaintiff's Exhibit B,' and plaintiff rests. Defendants offering no evidence, the cause was submitted to the court." Section 2 of said act No. 71 of the Laws of 1897 provides that when an appeal or writ of error is taken the clerk shall certify, among other things, all minute orders in the case. A recitation of what testimony was introduced is not a minute order, within the meaning of the statute, and is not intended to take the place of a statement of facts or a transcript of the evidence, provided for by section 1 of said act. But, even were we to accept this minute entry as a part of the record, there is nothing within the recital made to indicate whether or not the evidence offered and admitted was objected to by appellants. Before a ruling upon its admission could be made, there must have been an objection to its admission, and this, as we have said, does not appear. And, further, the recital in the minutes merely states that certain documents were offered in evidence, and that plaintiff rested. Presuming, as we must, in favor of the judgment and of the regularity of the court's proceedings, we cannot take the recital as a statement that no other or further evidence was introduced by plaintiff than that specified. The briefs filed both by appellant and appellee assume that no other evidence than the agreement and account mentioned

in the minutes of the clerk were introduced at the trial. This might be sufficient if we found any authority in the statutes for a trial of an action in this court brought on appeal or writ of error upon anything else than the record. Before even an agreed statement of facts can become a part of the record of any cause brought here on appeal or writ of error, such agreed statement must first have received the approval of the trial court. We cannot, therefore, review the questions presented by the assignments of error, and the judgment is affirmed.

Street, C. J., and Davis, J., concur.

[Civil No. 679. Filed March 28, 1900.]

[60 Pac. 874.]

THE PROVIDENCE GOLD MINING COMPANY, Defendant and Appellant, v. ALEXANDER THOMPSON et al., Plaintiffs and Appellees.

1. **CONTRACT—EXECUTION—EVIDENCE—FAILURE OF PROOF.**—The plaintiffs, husband and wife, owners of a sawmill, sued upon a contract, alleged to have been entered into with defendant corporation, for moving their mill and sawing lumber for defendant. The husband had a conversation with F., and a contract drawn up was signed by him, but never by his wife. There was no evidence that F., who was organizing defendant company, ever signed the contract, nor did the evidence show that defendant corporation was in existence at the time the alleged contract was entered into. *Held*, there was no substantial proof of a contract between plaintiffs or either of them and the Providence Gold Mining Company to sustain a verdict for damages for its breach.
2. **SAME—INSTRUCTIONS TO JURY—DAMAGES—FUTURE PROFITS.**—It is not error for the court to refuse to instruct the jury that the plaintiffs had failed to show any actual damage, and the evidence as to damages resulting from loss of profits was so vague and uncertain, and dependent upon so many conditions and contingencies, that plaintiffs were not entitled to recover, where the plaintiffs had introduced some evidence of probable or future profits.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Andrews & Ling, H. D. Stocker, and Herndon & Norris, for Appellant.

That prospective profits on a contract for sawing lumber are not sufficiently definite and certain to constitute an element of damages, see *Howard v. Stilwell & Bierce Mfg. Co.*, 139 U. S. 205, 11 Sup. Ct. 500; *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640; *Griffin v. Colver*, 16 N. Y. 489; *Cassidy v. Le Fevre*, 45 N. Y. 567; *Talcott v. Crippen*, 52 Mich. 633, 18 N. W. 392; *Jones v. Nathrop*, 7 Colo. 1, 1 Pac. 435; *Moulthrop v. Hyett*, 105 Ala. 493, 53 Am. St. Rep. 131, 17 South. 32; *Howe Machine Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735.

Morrison & Morrison, for Appellees.

Where the amount of work, the purchase price, and the market are all fixed by the terms of the contract, the damages are the profits which would have accrued under the terms of the contract. *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875; *Anvil M. Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876; *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81; *Carroll-Porter & Co. v. Columbus M. Co.*, 55 Fed. 451; *Skagit R. and L. Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077.

STREET, C. J.—The appellees, Alexander Thompson and Elizabeth Thompson, brought an action in the district court of Yavapai County against the Providence Gold Mining Company, a corporation, for damages for the breach of a contract. They alleged in their complaint that on or about the 1st of August, 1896, they entered into a contract with the Providence Gold Mining Company, a corporation, through S. J. Fleming, its president, to cut and saw for the company three hundred thousand feet of lumber, at the rate of eleven dollars per one thousand feet; that defendant corporation made a breach of said contract, and prevented the plaintiffs from performing their part of the same, and that by reason of said breach plaintiffs suffered a loss of profits in the sum of twelve

hundred dollars, and the further loss of five hundred and fifty dollars, special damages. The question of special damages was eliminated by the court on the trial. The answer of defendant raised a general issue. The cause was tried before the court and a jury. Plaintiffs obtained a verdict against the defendant for the sum of five hundred dollars damages, and judgment was rendered accordingly. A motion on the part of the defendant for a new trial was overruled, whereupon the defendant appealed from said judgment and from the order overruling the motion for a new trial to this court.

Of the assignments of error made by the appellant, we think it sufficient to consider only the one in relation to the order of the court overruling the motion for a new trial on the ground that the verdict of the jury is not supported by the evidence, and is contrary to the instructions of the court. A review of the evidence shows about this state of facts: That the appellees were the owners of a sawmill, and were running the same, on Groom Creek, in Yavapai County; that appellee Alexander Thompson and one S. J. Fleming, in the city of Prescott, in the office of Attorney Ling, had some talk about appellees moving their sawmill over to the Annie Mine, and making the necessary roads to the mill, and sawing for the Providence Gold Mining Company (a corporation) three hundred thousand feet of lumber, at the price of eleven dollars per one thousand feet; that a contract was drawn up in Ling's office, and read over to appellee Alexander Thompson, and that he signed the paper; that Ling then said to him, "You had better have your wife sign this," and further said that there had been some trouble before in regard to the mill, from her not having signed contracts in relation to it, to which appellee Alexander Thompson replied, "When the mill is moved, my wife will be in here, and she can sign it." The contract was left in Ling's hands, and it is quite uncertain from the evidence whether Fleming ever signed it. Appellee Elizabeth Thompson never did sign it. After that transaction in Ling's office, appellee Alexander Thompson went over to the Annie Mine, and looked at the timber and counted the trees, to see how much lumber could be obtained from the trees growing in that vicinity, and also bought a team of horses and engaged men to help move the mill, and to work with him at the Annie Mine, as he says, upon the strength of

the contract which he had with Fleming, for the Providence Gold Mining Company, to move the mill and enter upon the performance of the contract. That there was such a corporation in existence as the Providence Gold Mining Company at that time is not established by the evidence. Ling and Fleming say that the present Providence Gold Mining Company was not in existence then; that Fleming, as a promoter of the mining scheme, was organizing a corporation for the purpose of working the Annie Mine and some other mines adjacent, and had drawn up papers for the purpose of organizing such a corporation, but that the papers at the time that Fleming and Ling and Alexander Thompson had the conversation about the contract in Ling's office were never completed, and the organization was never perfected. Before Thompson moved his mill, or did anything at all towards carrying out his part of the contract, he learned through some source that Fleming repudiated the idea that he had entered into a contract with him, and went to Prescott to see Fleming about it. He met Fleming on the street, and asked him if he (Fleming) had broken the contract. Fleming answered that he had; that he had got another man to do it for fourteen dollars per one thousand feet, and build his own road and do everything else, and that he was not going to pay him (Thompson) any such price as he asked. Thompson told him that he had bought a team that he would have no use for if he did not have the contract, and Fleming offered to buy the horses from him for the price that Thompson had paid. That is about all the talk that took place between the appellees, or either of them, and any officer of the Providence Gold Mining Company.

The question as to whether there was a contract between the Thompsons and the Providence Gold Mining Company was left to the jury, under proper instructions, as was also the question of future profits. This court, in reviewing those instructions, sees nothing to criticise. The court below was not asked by the defendant, at the conclusion of the plaintiff's evidence, to peremptorily instruct the jury for a verdict, but proceeded with evidence for the defendant. Defendant voluntarily submitted the whole matter to the jury; asking, however, for the following instruction, to wit: "You are further instructed that plaintiffs have failed to prove any actual dam-

age resulting from the alleged breach of the alleged contract, but they rely solely upon the loss of profits. The evidence as to damages resulting from loss of profits is so vague and uncertain, and dependent upon so many conditions and contingencies, that I instruct you plaintiffs are not entitled to recover, and you will therefore find your verdict for the defendant," which instruction was refused by the court, and we think very properly, at that stage of the case. Some evidence was given by the plaintiffs as to their probable or future profits which they might have made had the contract been carried out; and it is quite possible that, had a proper instruction been asked at the proper time, the court would have been justified in taking the case from the consideration of the jury, but that is not before this court for consideration. We hold, from a review of the evidence, that, when the motion for a new trial was heard, the court then would have been justified in granting a new trial because of the insufficiency of the evidence to support the verdict; and we now hold, from an examination of the evidence, that there was no substantial proof of a contract between Alexander Thompson and Elizabeth Thompson, or either of them, and the Providence Gold Mining Company, to sustain a verdict, and the court below should have granted the motion for a new trial. The judgment of the district court is reversed, and a new trial granted.

Davis, J., and Doan, J., concur.

[Civil No. 715. Filed March 28, 1900.]

[60 Pac. 875.]

JOHN M. GARDINER, Appellant, v. J. J. GARDINER,
Appellee.

- 1. APPEAL AND ERROR—ASSIGNMENT OF ERRORS—FAILURE TO MAKE—**
WAIVER OF ALL ERRORS NOT FUNDAMENTAL.—A failure to comply with the statutory requirements as to assignments of error amounts to a waiver of all errors which are not fundamental, and there being no assignment of error, and none appearing on the face of the record, the judgment must be affirmed.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, and John D. Pope, for Appellant.

Baker & Bennett, for Appellee.

PER CURIAM.—No assignments of error have been filed by appellant or appear in the briefs filed. We have so often decided that a failure to comply with the statutory requirement as to assignments of error amounts to a waiver of all errors which are not fundamental, as to render it a work of supererogation to do more than again call attention to these rulings and the imperative requirement of the statute. In the absence of any assignment of error, and none appearing upon the face of the record, the judgment must be affirmed.

[Civil No. 693. Filed March 28, 1900.]

[60 Pac. 938.]

THE PROVIDENCE GOLD MINING COMPANY, Defendant and Appellant, v. JAKE MARKS et al., Plaintiffs and Appellees.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—MUST BE SPECIFIC—IN BRIEF—WAIVER OF ERRORS NOT ASSIGNED—ACT No. 71, SEC. 4, LAWS OF ARIZ. 1897, AND RULES OF COURT CITED.—The statutes, *supra*, relating to appeals provide, among other things, "that the briefs of the plaintiff in error or appellant shall contain a distinct enumeration, in the form of propositions, of the several errors relied on, and all errors, not assigned in the printed brief, shall be deemed to have been waived." The rules of court, *supra*, also provide that all assignments of errors must distinctly specify each ground of error relied upon. Where no errors are assigned, and none appear on the face of the record, the judgment of the lower court will be affirmed, notwithstanding there may exist a meritorious defense which the defendant might have urged in the court below.
2. SAME—SAME—CANNOT RAISE ISSUABLE FACTS—MUST SHOW ERROR OF COURT IN RULING—RECORD—NO ERROR APPEARING IN, JUDGMENT AFFIRMED IF NO ASSIGNMENT OF ERRORS—ACT No. 71, SEC. 4,

LAWs OF ARIZ. 1897, AND RULES OF COURT CITED.—On appeal from judgment in favor of plaintiff, in an action on an adverse claim to a mining location, appellant presented no assignment of errors, but submitted two propositions in its brief, viz.: "First, that this action was not commenced within thirty days of filing the adverse; second, that the verdict is contrary to the evidence and the weight of the evidence." These propositions are of issuable facts, and do not assign or impute error in the rulings or judgment of the lower court. Therefore in accordance with the statutes and rules of court, *supra*, no error appearing in the record, the judgment will be affirmed, although appellant might be able to establish both facts as set forth.

3. SAME—MINES AND MINING—ADVERSE—LIMITATIONS—REVIEW—SCOPE—SEC. 2326, REV. STATS. U. S., CITED.—The statute, *supra*, provides that an action on an adverse must be brought within thirty days after the adverse claim is filed. An issue as to whether an action was brought within this time, when not raised in the lower court, cannot be reviewed when presented for the first time on appeal.
4. STATUTE OF LIMITATIONS—SUBSTANTIVE DEFENSE—PLEADING—MUST BE RAISED BY ANSWER OR PLEA—MINES AND MINING—ADVERSE—SEC. 2326, REV. STATS. U. S., CITED.—An issue as to whether an action was brought within the thirty days required by statute, *supra*, was sought to be raised by a motion for judgment on the pleadings and a motion to strike from the files. *Held*, that the statute of limitations is a substantive defense which can only be raised by answer or plea.
5. APPEAL AND ERROR—RECORD—VERDICT—ASSIGNMENTS OF ERROR—CONFLICT IN EVIDENCE.—Where in addition to the record failing to show that the appellant moved to have the verdict set aside as against the evidence it appears that neither the refusal of the trial court so to do nor to grant a new trial on the ground that the verdict was against the evidence is assigned as error, and that there is substantial evidence to support the verdict, although there is a conflict, the verdict of the jury will not be disturbed on appeal.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Andrews & Ling, and Herndon & Norris, for Appellant.

Ross & O'Sullivan, for Appellees.

The statute of limitations cannot be taken advantage of, unless it be specially pleaded by way of answer or special

demurrer. *Chemung Canal Bank v. Lowery*, 93 U. S. 76; *Hexter v. Clifford*, 5 Colo. 168; *Thomas v. Glendinning*, 13 Utah, 47, 44 Pac. 652; *Horton v. Crawford*, 10 Tex. 382.

The motion to dismiss by the defendant in the trial court did not raise the question of limitation, and it cannot for the first time be raised in the appellate court. *Marshall Silver Min. Co. v. Kirtley*, 12 Colo. 410, 21 Pac. 492.

The question of citizenship cannot be first raised in the appellate court. *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. 421.

DOAN, J.—An action was brought in the lower court by the plaintiffs, who are the appellees herein, based upon an adverse claim filed against the application for patent made by the defendant, which is the appellant herein, for certain mining claims in the Big Bug Mining District, Yavapai County, Arizona. The adverse was filed on the seventh day of May, 1897. The original complaint was filed on the first day of June, 1897. A demurrer "for the reason that the complaint does not state facts sufficient to constitute a cause of action," and an answer entering the plea of not guilty, were filed on the fifteenth day of June, 1897, and on the thirteenth day of November, 1897, an amended answer was filed, containing the same demurrer and plea, and, in addition thereto, a general denial, and setting up the location of the several claims in dispute by the grantors of the defendant, and transfer by said grantors to the defendant. The general demurrer was sustained, and confessed by plaintiffs, on the fifteenth day of November, 1897, and, on leave granted, plaintiffs filed an amended complaint the same day. On the sixteenth day of November, 1897, defendant filed and presented a motion for judgment for the defendant on the pleadings, on the grounds that the amended complaint stated a new cause of action, and that, more than thirty days having elapsed since their adverse was filed, plaintiffs were barred under section 2326 of the Revised Statutes of the United States. After being fully argued by counsel, the motion was denied by the court, and leave granted defendant to file an amended answer. Defendant thereafter, on the same day, filed an amended answer to the amended complaint, being a *verbatim* copy of the demurrer, plea, denial, and special de-

fense, as set out in amended answer filed November 13, 1897, and mentioned above. Defendant's demurrer to plaintiffs' amended complaint on the ground that the complaint failed to state facts sufficient to constitute a cause of action was overruled. The case was tried to a jury. Thirteen witnesses for the plaintiffs and five for the defendant were sworn and testified. Documentary evidence was introduced on each side. The jury was charged by the court at considerable length, and, after deliberation, returned a verdict for the plaintiffs, and judgment was rendered for the plaintiffs in accordance with the said verdict. From this judgment and the order of the court denying a new trial the defendant appeals.

The appellant presents no assignment of errors, but submits to the court two propositions: "First, that this action was not commenced within thirty days of filing the adverse; second, that the verdict is contrary to the evidence and the weight of the evidence." This court, as previously held in the case of *Maricopa County v. Jordan*, ante, p. 4, 60 Pac. 693, (decided at the present term,) under like conditions, does not take up the legal issues involved in a case, and try them *de novo*, regardless of the manner in which they have been presented and tried in the lower court, or regardless of whether or not they have been presented for consideration in the lower court at all. Our statutes relating to appeals provide, among other things, "that the briefs of the plaintiff in error or appellant shall contain a distinct enumeration, in the form of propositions, of the several errors relied on, and all errors, not assigned in the printed brief, shall be deemed to have been waived." The rules of this court likewise provide that all assignments of errors must distinctly specify each ground of error relied upon. Where no errors are assigned, and none appear on the face of the record, the judgment of the lower court will be affirmed, notwithstanding there may exist a meritorious defense, which the defendant might have urged in the court below, and which he may now stand ready to urge in this court. Defendant's brief contains two propositions, but they are propositions of issuable facts, and do not assign or impute error in the rulings or judgment of the lower court. So that, unless error appears in the record, the judgment will be affirmed, although appellant might be able to establish both facts as set forth.

First. "This action is not commenced within thirty days of filing the adverse." We need not inquire into the truth of that fact as a fact. If that fact existed, and was not put in issue in the lower court, it cannot be first presented here. *Marshall etc. Mining Co. v. Kirtley*, 12 Colo. 410, 21 Pac. 492. If it was properly presented, and sustained by sufficient and competent evidence, in the lower court, and the court held the plaintiffs were not barred by that fact, the proposition should have presented the error of the court in thus holding. The record discloses that this fact was not put in issue, either by answer or demurrer, in the lower court. An original and amended answer and demurrer had been filed by defendant, neither of which raised this issue. After an amended complaint had been filed by the plaintiffs, defendant filed and presented a motion for judgment on the pleadings, for the reason "that plaintiffs' amended complaint, which states a new cause of action, was filed more than thirty days after their adverse claim, and plaintiffs' first, second, and third causes of action are thereby barred." This motion was very properly denied by the court. Appellant, in its brief, says that this motion, although erroneously termed a motion for judgment on the pleadings, was, in effect, a motion to strike the amended complaint from the files, for the reason, among others, that the same was filed after the period of the running of the statute of limitations. The motion was entitled, filed, presented, argued, and ruled upon as a motion for judgment on the pleadings. But, if we should consider it as a motion to strike from the files, the denial by the court was equally correct. If the reason assigned were true, the defendant was entitled to set up that fact in his answer as a defense, as he would plead any other defense, decisive of the issues in the case; but it was no ground for striking the pleading from the files. Cases are determined by trial of the issues raised by the pleadings, not by striking from the files every pleading to which a defense may be pleaded. After the motion for judgment was denied, on leave granted, defendant filed an answer and demurrer to the amended complaint, but did not, in either said demurrer or answer, plead the statute of limitations. The rule is plain and well settled that the statute of limitations, to be available, must be raised by special plea, and that a general demurrer on the ground

that the complaint does not state facts sufficient to constitute a cause of action does not effect that purpose. Neither can the bar of the statute be pleaded by motion. The ruling of the United States supreme court (*Bank v. Lowery*, 93 U. S. 72, 23 L. Ed. 806, citing and approving *Howell v. Howell*, 15 Wis. 55) under a statute identical with ours has been recognized and followed without exception. Mr. Justice Bradley says: "It is provided that 'the objection that the action was not commenced within the time limited can only be taken by answer' (Rev. Stats. Wis., sec. 819); but the supreme court of Wisconsin has decided that when, on the face of the complaint itself, it appears that the statutory time has run before the commencement of the action, the defense may be taken by demurrer, which, for that purpose, is a sufficient answer. On the first hearing of the case of *Howell v. Howell*, some importance was attached to the fact that it was an equity case, in which class of cases a demurrer has been allowed for setting up the statute of limitations; but on a rehearing a more enlarged view was taken, and a demurrer was regarded as sufficient in all cases where the lapse of time appears in the complaint without any statement to rebut its effect, and where the point is especially taken by the demurrer. If the plaintiff relies on a subsequent promise, or on a payment to revive the cause of action, he must set it up in the original complaint, or ask leave to amend. Without this precaution the complaint is defective in not stating, as required by the statute, facts sufficient to constitute a cause of action. But, although defective, advantage cannot be taken of the defect on motion, or in any other way than by answer; which answer, however, as we have seen, may be a demurrer." The statute of limitations not having been raised in the lower court, and the record disclosing no error in the rulings of the court on the matters that were presented, disposes of the first proposition.

Upon the second proposition, "The verdict is contrary to the evidence and the weight of the evidence," beyond the fact that the record does not show that the defendant moved to have the verdict set aside as against the evidence, and that neither the refusal of the court so to do or to grant a new trial on the ground that the verdict was against the evidence is assigned as error, lies the further fact that the record does contain the testimony of thirteen witnesses that affords

substantial evidence in support of the controverted allegations in the complaint on which the jury found the verdict. The rule that in cases of conflicting testimony the appellate court will not disturb the verdict of a jury when there is substantial evidence to support it is so universal that the citation of authorities is unnecessary. The judgment of the lower court is affirmed.

Street, C. J., and Davis, J., concur.

[Civil No. 690. Filed March 28, 1900.]

[60 Pac. 885.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. THE COPPER QUEEN CONSOLIDATED MINING
COMPANY, a Corporation, Defendant and Appellee.

1. PUBLIC LANDS—MINERAL LANDS—WHAT CONSTITUTES—RIGHT TO CUT TIMBER—ACT CONG. JUNE 3, 1878, CONSTRUED.—Mineral in sufficient quantities to justify exploration and development, and in quantities which it will pay to work, must be shown to exist, and the existence thereof in the land must be demonstrated as a present fact, in order to justify the cutting of timber therefrom, or the purchase of such timber after being cut, under the act of June 3, 1878, providing that certain persons are "hereby authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or trees growing or being on the public lands, said lands being mineral and not subject to entry . . . except for mineral entry."
2. APPEAL AND ERROR—VERDICT—WILL NOT BE DISTURBED IF ANY EVIDENCE TO SUSTAIN.—Evidence having been given on the trial as to the mineral or non-mineral character of the land in controversy, and there being evidence to support the verdict, the same will not be disturbed on appeal.
3. PUBLIC LANDS — TIMBER — BONA FIDE RESIDENTS MAY CUT — ACT CONG. JUNE 3, 1878, CONSTRUED.—The act, *supra*, providing that "All citizens of the United States and other persons *bona fide* residents," etc., includes aliens as well as citizens, provided that they be *bona fide* residents of the states, territories, and districts mentioned, among the persons authorized to fell and remove any timber or other trees on the public mineral lands.

4. **SAME—SAME—EVIDENCE—BONA FIDE RESIDENCE—WHAT CONSTITUTES—ACT CONG. JUNE 3, 1878, CONSTRUED.**—The statement that witness "moved" into Rock Creek in 1883, having reference to his change of residence, in connection with the fact that he was for ten years engaged in an extensive lumbering business at Rock Creek, is sufficient to establish his *bona fide* residence within the territory so as to give him the privilege of cutting timber on mineral lands, as provided in act of June 3, 1878.
5. **SAME—SAME—SECRETARY OF INTERIOR—AUTHORITY AND LIMITATIONS IN MAKING RULES AND REGULATIONS UNDER ACT CONG. JUNE 3, 1878.**—The act of June 3, 1878, regarding the cutting of timber on mineral lands gives the secretary of the interior authority to make rules and regulations; and so far as they may relate to the protection of the timber and of the undergrowth growing upon such mineral lands and for other purposes, they have the effect of law. But it does not follow that the secretary of the interior may prescribe from what lands timber may be cut, or in any way enlarge or detract from the privileges granted in said act.

AFFIRMED. 185 U. S. 495, 46 L. Ed. 1008.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Robert E. Morrison, U. S. District Attorney, and Thomas D. Bennett, Assistant U. S. District Attorney, for Appellant.

The defendant was required to show that Ross was a citizen and a *bona fide* resident. *Northern Pacific Ry. Co. v. Lewis*, 162 U. S. 366, 16 Sup. Ct. 831; *United States v. Legg*, Compilation of Timber Laws, 1897, p. 63; *United States v. Tipton*, Compilation of Timber Laws, 1887, p. 55.

William Herring (Sarah H. Sorin, of Counsel), for Appellee.

The strict rule invoked by plaintiff and set forth in the instructions to the jury given at its request, that in order to constitute "mineral lands" the land must be shown to contain mineral of commercial value,—that it must be land which it will pay to mine by the usual modes of mining,—is a rule which applies only to contests of parties claiming the land for different purposes, and which is not applicable in

determining what lands are subject to location and entry as mineral lands, under the mining laws of the United States, or determining what lands are mineral lands within the meaning of the statute of June 3, 1878. *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 240; *Book v. Justice Min. Co.*, 58 Fed. 124; *Shreve v. Copper Bell Min. Co.*, 11 Mont. 309, 28 Pac. 315.

A *bona fide* resident of the territory of Arizona is expressly authorized to cut timber on the public mineral lands, and it is immaterial whether the evidence discloses that such resident was also a citizen or not. *United States v. Smith*, 11 Fed. 487, 8 Saw. 101; *United States v. Eureka and P. R. Co.*, 40 Fed. 419; *United States v. Richmond Min. Co.*, 40 Fed. 415.

The act of Congress of June 3, 1878, does not empower the secretary of the interior to prescribe rules and regulations which limit or abridge the privileges conferred by that statute, and any rule or regulation of the secretary of the interior in relation to cutting timber on the public mineral lands which impairs the license granted by that act is unconstitutional and void. The interpretation placed upon the public-land acts by the secretary of the interior is not binding upon the courts. *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 61, 15 Sup. Ct. 1020; *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98; *Lake Superior Ship R. and I. Co. v. Cunningham*, 155 U. S. 354, 15 Sup. Ct. 103; *Irvine v. Marshall*, 20 How. 567; *United States v. Murphy*, 32 Fed. 376; *United States v. Dickson*, 15 Pet. 141.

The question as to the existence of mineral in the lands upon which the timber was cut and the question of its quantity and value were matters of fact for the determination of the jury. As to the character of the land, their verdict is conclusive. *United States v. Edwards*, 38 Fed. 812; *Book v. Justice Min. Co.*, 58 Fed. 106; *Blue Bird Min. Co. v. Largey*, 49 Fed. 289; *Iron Silver Min. Co. v. Mike & Starr G. and S. Min. Co.*, 143 U. S. 394, 12 Sup. Ct. 543; *United States v. Saucier*, 5 N. Mex. 569, 25 Pac. 791.

SLOAN, J.—The United States, on March 6, 1895, brought suit in the district court of the first judicial district against one D. D. Ross and the Copper Queen Consolidated Mining Company, a corporation, to recover the sum of \$183,070.50, the value of certain timber alleged to have been wrongfully

cut and removed from the public lands of the United States by said defendants. A trial was had in November, 1895, which resulted in the disagreement of the jury, whereupon the further trial of the case was continued until the twenty-fifth day of May, 1898, when the plaintiff was granted leave to file, and did file, an amended complaint, which, omitting the title of the court and the cause, was as follows: "(1) The defendant the Copper Queen Consolidated Mining Company is a corporation organized and existing under and by virtue of the laws of the state of New York, and doing business in the county of Cochise, territory of Arizona. (2) That said defendant wrongfully cut and caused to be cut and removed from the surveyed and unsurveyed public lands of the United States of America, a large quantity of timber, to wit, five millions nine hundred and five thousand five hundred feet of timber. (3) That said timber was by the defendant wrongfully cut and caused to be cut from the following surveyed and unsurveyed public lands of the United States of America, to wit: That certain land lying in a cañon in the Chiricahua Mountains in, east of, and adjacent to townships seventeen and eighteen south, ranges twenty-nine and thirty east of Gila and Salt River base and meridian, about sixty miles southeast from the town of Willcox, on the Southern Pacific Railway, and on what is known as 'Rock Creek,' all in the county of Cochise, territory of Arizona. (4) That the value of the timber so wrongfully cut and caused to be cut and removed from the said public lands of the United States of America was the sum of thirty-one dollars per thousand feet, and of the aggregate value of one hundred and eighty-three thousand seventy and fifty one-hundredths dollars (\$183,070.50) lawful money of the United States of America. (5) That all of said timber aforesaid wrongfully cut and caused to be cut and removed from the surveyed and unsurveyed public lands aforesaid by defendant belonged to and was the property of the United States of America, and all said timber was cut, removed, taken by, delivered to, and used and consumed by defendant Copper Queen Consolidated Mining Company. (6) That at the time the timber aforesaid was wrongfully cut, caused to be cut, removed, taken by, delivered to, and used and consumed by the defendant from the lands aforesaid, the said lands were surveyed and unsurveyed public

lands of the United States of America, and defendant well knew that said timber was the property of the United States, and was wrongfully cut, caused to be cut, removed, taken by, delivered to, and used and consumed by defendant Copper Queen Consolidated Mining Company. Wherefore plaintiff prays judgment against defendant for the sum of one hundred and eight-three thousand seventy and fifty one-hundredths dollars (\$183,070.50) lawful money of the United States of America, and for its costs and disbursements in this action incurred." To the amended complaint the defendant company filed its answer, denying that it had cut or removed, or caused to be cut or removed, the timber, or any of the timber, mentioned in the complaint; and further denying that the said timber, or any part of it, was cut upon the surveyed public lands of the United States; but alleging that one Daniel D. Ross, formerly made defendant in the action, but since deceased, cut and removed, and caused to be cut and removed, from the unsurveyed public lands of the United States lying in a cañon in the Chiricahua Mountains, known as "Rock Creek," and within the county of Cochise, the quantity of timber mentioned in the complaint; that this timber was sold and delivered to it by said Ross at the town of Bisbee, in said territory, and was used and consumed by it wholly for mining and other domestic purposes within the territory. The answer further alleged that Ross cut and removed said timber from the public mineral lands of the United States under the authority of the act of Congress of June 3, 1878; that said Ross, at the time he so cut and removed said timber, was a citizen of the United States of America, and that at the time both the defendant and said Ross were *bona fide* residents of the territory; that the portion of the said Chiricahua Mountains from which said timber was cut and removed was not subject to entry under the existing laws of the United States, except for mineral entry; that said land from which said timber was cut was within the organized mining districts, and was in the vicinity of and adjacent to valuable known and recognized mines, and was and is mineral land within the meaning of said act of Congress. The cause was tried to a jury upon the amended complaint and answer, and a verdict found for the defendant. The United States appeals from the order overruling its motion for a new trial and from the judgment.

The act of Congress of June 3, 1878, reads as follows: "All citizens of the United States and other persons, *bona fide* residents of the state of Colorado, or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: provided, the provisions of this act shall not extend to railroad corporations." The appellant assigns as error that the proof in the case failed to show authority on the part of Ross or the defendant to fell and remove the timber in question, for the reason that it was not shown that the lands from which said timber was taken were of the class of lands mentioned in said act, in that it was not shown that said lands were "mineral, and not subject to entry under existing laws of the United States, except for mineral entry." Upon this subject the trial court charged the jury as follows: "Proof of the existence of some measure of minerals in the lands from which the timber was cut, or proof of traces, indications, or possibilities that said land contained valuable mineral deposits, or that the lands in question are high, rugged, rough, and precipitous, cannot in itself impress said lands with a mineral character. Mineral in sufficient quantities to justify exploration and development, and in quantities which it will pay to work, must be shown to exist, and the existence thereof in the land must be demonstrated as a present fact, in order to justify the cutting of timber therefrom, or the purchase of such timber after being cut, under the act of June 3, 1878. The mere fact that portions of the land from which the timber was cut contained particles of gold or other valuable mineral deposits, or veins of gold-bearing quartz, would not necessarily impress it with the

character of mineral land as herein defined, and within the meaning of the act of June 3, 1878. It must, at least, be shown that said lands contained metals in quantities sufficient to render it available and valuable for mining purposes." These instructions embrace a full and accurate definition of the term "mineral land," as used in said act of Congress and other statutes of the United States. A mass of testimony was introduced at the trial on the part of the defendant and on the part of the plaintiff tending to show, on the one part, the mineral character of the land, and, on the other, the non-mineral character of the land. A consideration of the evidence satisfies us that the geological conditions exist at the place where the timber was cut which render it probable that mineral in paying quantities may exist; that discoveries of mineral of more or less value have been made, but that it is still to some extent problematical as to whether paying mines will ever be discovered and developed thereon. Before, however, disturbing the verdict upon the ground of the insufficiency of the evidence, it ought to appear that, conceding the testimony adduced by the defendant to show the mineral character of the lands to be true, the fact is still unproven. We cannot say, from a consideration of the evidence, that the jury disregarded the law defining the term "mineral lands," as used in the act of June 3, 1878, or that their finding that the lands in question were mineral in character is not justified by the evidence.

It is contended by counsel for appellant that the verdict of the jury should be set aside, and a new trial granted, because the defendant failed to prove that D. D. Ross, who was shown to have cut and removed the timber in question, and from whom the defendant purchased the same, was a citizen of the United States and a *bona fide* resident of the territory. The contention on the part of the appellant is, that the authority granted in said act of June 3, 1878, is limited by the terms of the act to a citizen of the United States who is also at the time a *bona fide* resident of the territory. The language of the act is, "All citizens of the United States and other persons *bona fide* residents," etc. The language used can have no other meaning than as including aliens as well as citizens, provided they be *bona fide* residents of the states and territories and districts mentioned, among the persons

thus authorized to fell and remove any timber or other trees on the public mineral lands. No case has been cited by appellant in which any of the federal courts have construed the act of June 3, 1878, as limiting the authority to cut timber therein granted to those persons who are both citizens and *bona fide* residents of the states, territories, or districts mentioned. While *dicta* may be found which would imply that this construction has been given, it does not appear that the precise question as to whether an alien who is a *bona fide* resident of one of the states or territories named is prohibited by the terms of said act of June 3, 1878, from cutting timber upon public mineral lands. The case of *Railroad Co. v. Lewis*, 162 U. S. 366, 16 Sup. Ct. 831, 40 L. Ed. 1002, cited by counsel for appellant, did not involve the question in point, in that the persons charged with having cut the wood which was the subject-matter of the action were both citizens of the United States and residents of Montana, where the cutting was done. The learned justice who wrote the opinion in that case, we think inadvertently, in stating in general terms the provisions of the act of June 3, 1878, omitted to give any meaning to the term "and other persons" used in the act. *Dicta* may be found in other decisions construing the act as we are construing it. *United States v. Smith*, (C. C.) 11 Fed. 487; *United States v. Eureka and P. R. Co.*, (C. C.) 40 Fed. 419; *United States v. Richmond Min. Co.*, (C. C.) 40 Fed. 415. Holding, therefore, as we do, that a *bona fide* resident of the territory, whether he be a citizen or not, is privileged to cut timber from the public mineral lands, by the terms of said act, the failure of the defendant to prove the citizenship of Ross is of no consequence. Ross, in his deposition introduced at the trial, stated that he had "moved" into Rock Creek in 1883, and began the cutting of timber, and continued to cut timber and supply the defendant with the same until 1893. The term "moved," as used by Ross, in its connection no doubt had reference to his change of residence. This, in connection with the fact that he was for ten years engaged in an extensive lumbering business at Rock Creek, is sufficient, in our judgment, to establish his *bona fide* residence within the territory.

The appellant requested the trial court to instruct the jury as follows: "You are further instructed that by virtue

of said act, and pursuant to the authority therein imposed, the secretary of the interior thereafter prescribed certain rules and regulations, which thereupon became laws of the same force and effect as the statute itself. That portion of the said regulations to which the defendant must conform in order to justify under the license granted by the statute, and which is applicable to the facts in this case, is found in the first, second, and third paragraphs of said regulations, and is as follows: (1) The act applies only to the states of Colorado and Nevada and the territories of New Mexico, Arizona, Utah, Wyoming, Idaho, and Montana, and other mineral districts of the United States not specially provided for. (2) The land from which timber is felled or removed must be known to be of strictly mineral character, and that it is not subject to entry under the existing laws of the United States except for mineral entry. (3) No person, not a citizen or *bona fide* resident of a state, territory, or other mineral district provided for in said act, is permitted to fell or remove timber from mineral lands therein. And no person, firm, or corporation felling or removing timber under this act shall sell or dispose of the same, or the lumber manufactured therefrom, to any other person than citizens and *bona fide* residents of the state or territory where such timber is cut, nor for any other purpose than the legitimate use of said purchaser for the purposes mentioned in said act." This instruction was refused, and the refusal is made the basis for an assignment of error by appellant. It is true that the rules and regulations prescribed by the interior department by the terms of the act of June 3, 1878, so far as they may relate to the protection of the timber and of the undergrowth growing upon such mineral lands, and for other purposes, have the effect of law. But it does not follow that the secretary of the interior may prescribe from what lands timber may be cut, or in any way enlarge or detract from the privileges granted in said act. The trial court did instruct the jury fully as to the provisions of the act of June 3, 1878. The instructions asked, as being a portion of the regulations imposed by the secretary of the interior, in effect were given by the court in other instructions, except that in the second paragraph of the regulations given in the instruction the term "strictly mineral" is used in defining the character of

the land from which timber may be felled. If the term "strictly mineral," as used in the regulation of the secretary, is to be construed as in any manner modifying or limiting the act of June 3, 1878, the instruction was properly refused, for the reason that under the terms of the act it is not within the province of the secretary to make any such regulation. The act itself determined from what kind or character of lands timber might be cut. If we construe the term "strictly mineral" to mean nothing more than lands upon which timber may be cut shall be mineral, and not subject to entry under existing laws of the United States except for mineral entry, the definitions given by the court in his other instructions, some of which we have given, fully covered the ground, and there was no necessity or propriety in further charging the jury upon this subject. The refusal of the trial court to give the instruction asked constitutes no ground of error. The judgment is affirmed.

Street, C. J., and Doan, J., concur.

[Civil No. 698. Filed March 28, 1900.]

[60 Pac. 393.]

TERRITORY OF ARIZONA ex rel. SAMUEL W. PRICE,
Relator, v. FLETCHER M. DOAN, Judge of the Dis-
trict Court of the Second Judicial District of the Terri-
tory of Arizona, in and for the County of Graham,
Respondent.

1. CERTIORARI—WHEN PROPER REMEDY—FORCIBLE ENTRY AND DETAINER—BOND ON APPEAL—JURISDICTION—PARS. 134, 2026, REV. STAT. ARIZ., CONSTRUED.—A writ of *certiorari* may be issued as provided by the Revised Statutes of Arizona of 1887 (par. 134) when an inferior court has exceeded its jurisdiction, and there is no appeal, nor any speedy and adequate remedy. In forcible entry and detainer cases paragraph 2026 of the Revised Statutes of Arizona of 1887 limits an appeal from the district court to cases where the damages awarded exceed on hundred dollars. On appeal from a decision of a justice in a case of forcible entry and de-

tainer defendant gave a jurisdictionally defective bond, and the district court overruled the plaintiff's motion to dismiss appeal for want of a proper bond. It appearing that no damages could be awarded against the plaintiff, *certiorari* is the proper remedy to test the question of the jurisdiction of the district court.

2. **APPEAL-BOND—IN FORCIBLE ENTRY AND DETAINER—JURISDICTIONAL—WHEN DEFECTIVE**—PARS. 2021, 2022, REV. STATS. ARIZ. 1887, CITED.—Where an appeal-bond in an action for forcible entry and detainer provided that appellant should prosecute said appeal to effect, and should fully pay off, satisfy, and perform the judgment which may be rendered against him on said appeal, said bond was defective because it limited the liability to three hundred dollars. Paragraph 2021, *supra*, provides that the condition of such an appeal-bond must be that the appellant shall prosecute his appeal with effect or pay all costs and damages which may be adjudged against him, and neither paragraphs 2021 nor 2022, *supra*, provides for a limitation of the amount of the liability.
3. **SAME—DEFECTIVE—NEW BOND—CANNOT BE GIVEN AFTER TIME FOR TAKING APPEAL HAS EXPIRED—JURISDICTIONAL—PUTNAM v. PUTNAM**, 2 ARIZ. 259, 24 PAC. 320; **JOHNSTON v. LETSON**, 3 ARIZ. 344, 29 PAC. 893; **CROWLEY v. REILLY**, 3 ARIZ. 286, 29 PAC. 14; **MCDONALD v. ELLIS**, 4 ARIZ. 189, 36 PAC. 37, APPROVED.—Where an appeal-bond is made jurisdictional, any substantial variation from the conditions of the bond required to be given defeats the jurisdiction of the appellate court, and no bond can be given such as to confer jurisdiction after the expiration of the time limited by statute for taking an appeal.

APPLICATION for a Writ of Certiorari.

F. B. Laine, for Relator.

Moorman & McFarland, for Respondent.

The only question involved in certiorari proceedings is, Has the inferior tribunal, board, etc., exceeded its jurisdiction? Rev. Stats. 1887, par. 134.

Our statute limits the review upon this writ to the sole question of "whether the inferior tribunal, board, etc., has regularly pursued its authority." Rev. Stats. 1887, 140.

The questions whether or not the jurisdiction has been exceeded and whether or not the inferior tribunal has regularly pursued its authority are one and the same. *Phillips v. Welch*, 12 Nev. 158, 178; *Reilly v. Tyng*, 1 Ariz. 510, 25 Pac. 798; *Territory v. Dunbar*, 1 Ariz. 510, 25 Pac. 473; *Royce v. Smith*, 1 Ariz. 511, 25 Pac. 799.

The question presented in this case involves the power of the district court to hear and determine the motion to dismiss the appeal in the case of *Price v. Lynch*. If the court had the right to determine this motion, then its acts were not in excess of its jurisdiction, and it was regularly pursuing the authority of such tribunal. Its determination of said motion may have been erroneous or irregular, but such errors and irregularities do not involve questions of jurisdiction, hence not reviewable under *certiorari*. *Alexander v. Municipal Court*, 66 Cal. 387, 5 Pac. 675; *Quinchard v. Board of Trustees*, 113 Cal. 664, 45 Pac. 856; *Buckley v. Superior Court*, 96 Cal. 119, 31 Pac. 8 (this case overrules *Carlson v. Superior Court*, 70 Cal. 628, 11 Pac. 788); *Beizer v. Lasch*, 28 Wis. 268; *Tomasini v. Superior Court*, 75 Cal. 225, 17 Pac. 1; *Phillips v. Welch*, 12 Nev. 158; *Board of Supervisors v. Superior Court*, (Cal.) 50 Pac. 432; *Sherrer v. Superior Court*, 96 Cal. 653, 31 Pac. 565.

The office of *certiorari* is to bring up the record to enable the superior court to determine whether the inferior court, board, etc., has proceeded within its jurisdiction, and not whether it has committed error. *People v. Highway Commissioners*, 30 N. Y. 72; *Whitney v. Board of Delegates*, 14 Cal. 478; *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118.

The question whether the inferior board or tribunal had jurisdiction to do the act sought to be reviewed is the only question which can be reviewed on *certiorari*. *State v. Humboldt County*, 6 Nev. 100; *Central Pacific R. R. Co. v. Placer County*, 46 Cal. 667; *Fraser v. Freelon*, 53 Cal. 644; *White v. City of San Francisco*, 110 Cal. 60, 42 Pac. 480; *Orr v. State Board*, 3 Idaho 190, 28 Pac. 416; *Commissioners v. Superior Court*, 27 Ill. 140; *Savage v. County Commissioners*, 10 Ill. App. 204; *Hamilton v. Harwood*, 113 Ill. 154; *Plymouth v. Plymouth County*, 16 Gray, 341; *Carland v. Custer*, 5 Mont. 579, 6 Pac. 24; *State v. Second Judicial District*, 10 Mont. 456, 26 Pac. 182; *Maynard v. Rayley*, 2 Nev. 313; *People v. New York Canal Board*, 29 Hun, 159; *State v. Fort*, 24 S. C. 510; *Houser v. State*, 33 Wis. 678.

The fact that the amount involved in controversy is less than that authorizing an appeal from the district court is no ground for *certiorari*. *State v. Superior Court*, 3 Wash. 705, 29 Pac. 213; *Ex parte Ferry Co.*, 104 U. S. 519.

SLOAN, J.—This is an application for a writ of *certiorari*, brought by the territory, on the relation of Samuel W. Price, to review certain orders made by the district court of the second judicial district in and for the county of Graham in the suit of Samuel W. Price against C. E. Lynch. The return shows that Price brought suit in a justice court of Graham County, under the forcible entry and detainer statutes, against Lynch, to obtain possession of a certain tract of land. Price obtained judgment for the restitution of the premises and for costs on February 6, 1899. On February 8, 1899, Lynch gave notice of appeal to the district court, and filed a bond, the body of which read as follows: "Know all men by these presents, that we, C. E. Lynch, as principal, and George Hormayer and W. F. Hagan, as sureties, are firmly held and bound unto S. W. Price in the penal sum of three hundred dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Witness our hands hereto this eighth day of February, 1899. The condition of the above undertaking is such that whereas, on the 6th day of February, 1899, the said S. W. Price duly recovered a judgment in the above-entitled court against C. E. Lynch for ———; and whereas, the said C. E. Lynch is desirous of appealing from the decision and judgment of said justice to the district court of the second judicial district of the territory of Arizona in and for Graham County: Now, therefore, if said C. E. Lynch shall prosecute said appeal to effect, and shall pay off, satisfy, and perform the judgment which may be rendered against him on said appeal, then this obligation shall be null and void; otherwise, to remain in full force and virtue."

On March 22, 1899, the appellee, Price, moved in the district court the dismissal of the appeal upon the grounds, as stated in the motion, namely: "First, there is no bond or undertaking filed on appeal in said cause, as required by paragraph 1453 of the Revised Statutes of the territory of Arizona; second, that the paper purporting to be an undertaking on appeal in said cause is void and of no effect, for the reason that the attorney of record for the defendant is one of the sureties therein, contrary to act No. 93 of 1891 of the legislature of the territory of Arizona (Acts 1891, p. 143);

third, that said undertaking is not accompanied by the affidavit of justification by each of the sureties therein, as required by paragraph 868 of the Revised Statutes of Arizona." The district court overruled the motion to dismiss, and ordered the appellant to give a new bond within five days, or suffer the penalty of dismissal. A new bond, proper in all respects as to form, was given by the appellant within the time limited by the order of the court. It appears further that the cause was, by consent of both of the parties, continued for the term, and is still pending and undetermined in the district court.

Counsel for respondent take the position that, assuming that the bond on appeal first given did not give the district court jurisdiction of the action, the ruling of the court upon the motion to dismiss is not subject to review in this proceeding; in other words, that *certiorari* is not the proper remedy. The argument is that the district court had the right to determine the question of its own jurisdiction; and, however erroneous its decision might be, it acted wholly within its powers in passing upon the motion to dismiss, and there was therefore no such excess of jurisdiction exercised by it as to render the decision reviewable by *certiorari*. This view of the law of *certiorari* is fallacious, because it disregards the fundamental principle upon which writs of review are granted or refused, which is that it is not the question how, or in what manner, the inferior court has mistaken its jurisdiction, but rather, whether its proceedings were in excess of its jurisdiction, and, if so, does *certiorari* present the only adequate remedy? The writ is not one of right, but its issuance lies in the sound discretion of the court authorized to grant it. It will not be permitted to take the place of an appeal or writ of error, even to correct judgments or other proceedings of a court in excess of jurisdiction. Our statute is framed with this idea of the province of the writ, and provides that it may issue when there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. The question whether, therefore, this is a proper case for the granting of the writ of *certiorari*, in the first place, and the review in this proceeding by this court of the proceedings of the court below in exercising jurisdiction over the case of Price against Lynch, is to be decided upon the

inquiry whether or not an appeal would lie to this court which would bring up the question of the court's jurisdiction, or whether there be any other plain, speedy, or adequate remedy. The action in forcible entry and detainer is purely statutory. The general statutes with regard to appeals have, therefore, no application. Paragraph 2026 of the Revised Statutes limits an appeal from the judgment of the district court in forcible entry and detainer to the one case in which a judgment for damages is awarded in an amount exceeding one hundred dollars. In order, therefore, to secure the right of appeal in this case, Price must not only suffer judgment to be taken against him, but he must also be mulcted in damages in an amount exceeding one hundred dollars. And as Lynch, under the pleadings, was in possession of the premises sued for at the time when judgment was rendered in the justice court, and so far as the record discloses, has not since been dispossessed by Price, no basis for such damages appears in the case. We hold, therefore, that the remedy by appeal is not afforded Price; nor is there any plain, speedy, and adequate remedy at his disposal other than this proceeding. The bond given by Lynch in the justice court was defective in two essential particulars. In the first place, contrary to the statutes, the sureties sought to limit their liability to the amount specified in the bond. In the second place, the condition of the bond was not that required by the statute. By the provisions of paragraph 2021, the giving of a bond on appeal from the judgment of a justice court to the district court in case of forcible entry and detainer is made jurisdictional. Paragraph 2022 prescribes the form of the bond to be given. In neither of these sections of the statute are the sureties privileged to limit their liability in any certain sum to be named in the bond. Again, the condition of the bond, by the express terms of the statute, must be that the appellant shall prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him; whereas, by the bond given, the conditions were that the appellant should "prosecute said appeal to effect, and shall fully pay off, satisfy, and perform the judgment which may be rendered against him on said appeal." This court has repeatedly held that, where an appeal bond is made jurisdictional, the appellate court acquires no jurisdiction

unless a bond be given in all respects, as to essential requirements, as provided by the statute, within the time limited for the giving of the bond. Any substantial variation from the conditions of the bond required to be expressed has been held to defeat the jurisdiction of the appellate court, and no new bond can be given such as to confer jurisdiction after the expiration of the time limited by statute for taking an appeal. *Putnam v. Putnam*, 2 Ariz. 259, 24 Pac. 320; *Johnson v. Letson*, 3 Ariz. 344, 29 Pac. 893; *Crowley v. Reilly*, 3 Ariz. 286, 29 Pac. 14; *McDonald v. Ellis*, 4 Ariz. 189, 36 Pac. 37. We hold, therefore, that the district court acquired no jurisdiction of the case of Price against Lynch, and the order and judgment of this court is that the district court of the second judicial district of the territory of Arizona in and for the county of Graham be directed to dismiss said appeal

Street, C. J., and Davis, J., concur.

[Civil No. 700. Filed March 28, 1900.]

[60 Pac. 896.]

E. A. WILTSEE, Plaintiff and Appellant, v. THE KING OF ARIZONA MINING AND MILLING COMPANY, a Corporation, Defendant and Appellee.

1. MINES AND MINING—LOCATION OF CLAIM—NOTICE OF LOCATION—DESCRIPTION—CONSTRUCTION.—As to a mining location notice, there is no rule of necessity, such as exists in the construction of a deed, which requires that the term "easterly," used without qualifying language, shall denote due east, and the term "westerly" shall denote due west. In the sense in which "easterly" is used by the miner and prospector, the term denotes the general course of a vein or location running nearer towards the east than any of the other cardinal points of the compass.
2. ~~SAME—SAME—SAME—SAME—SAME—WHERE BOUNDARIES ARE NOT DEFINITELY LOCATED BY ERECTION OF MONUMENTS AT TIME—AREA RESERVED.~~—A notice of location which gives the course of the location as running westerly so many feet from a discovery shaft or point of discovery, until boundaries are definitely located by

the erection of monuments, must be held to reserve from entry by subsequent locators the surface area which might be included within any location so made that, were a line drawn lengthwise through the center of said claim from the west center end through the point of discovery to the east center end of said claim, said line would lie at some point between east forty-five degrees north and east forty-five degrees south from the point of discovery.

3. SAME — SAME — SAME — SAME — SAME — WHERE MONUMENTS ARE PLACED—INTERVENING RIGHTS PROTECTED.—Should the locator, at the time of posting his notice, in addition to giving the general course of his vein, place monuments at the center of each end-line, and thus definitely give notice to subsequent locators as to the meaning and intent of the language used in his notice as to the general course of his location, under the law he is bound by the location thus made and defined, so that he may not thereafter, and during the ninety days permitted for the perfection of his location, change the course of his location to the prejudice of intervening rights.
4. SAME—SAME—SAME—SAME—SAME—INSTRUCTIONS TO JURY.—Where the original location notice as posted did not definitely locate the easterly end of the claim, the court properly refused to charge that the law requires the location notice to substantially conform to the location certificate, and if the locator changed the easterly end of the claim from where it was first located by his location notice to a point eight hundred feet northerly, as fixed by the location certificate, such change was void, as it was not a substantial compliance with the notice.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yuma. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, for Appellant.

Frank Cox, and E. S. Ives, for Appellee.

SLOAN, J.—The King of Arizona Mining and Milling Company, appellee herein, made application in the United States land office at Tucson for patents to a group of mining claims situated in Yuma County, among them being one known as the "Homestake." The official survey of the Homestake showed that it conflicted with the Black Iron and the Iron Mask mining claims, owned by the appellant, Wiltsee, the area of conflict between the Homestake and Black

Iron claims being 3.6 acres and the area of conflict between the Homestake and Iron Mask claims being 5.6 acres. Wiltsee filed his adverse in the land office against the issuance of patent to the appellee to the ground in conflict, and within the time allowed by law in aid of said adverse brought suit in the district court of Yuma County, setting up in his complaint the location of the Black Iron and the Iron Mask claims, on February 25, 1897, by one Edward Cain and one William O'Brien, citizens of the United States, the conveyance from said locators of said claims to himself, the pendency of the application for patent made by appellee, his adverse of the same within the time allowed by law, the conflict between the Homestake and the Black Iron and Iron Mask claims, the invalidity of the Homestake; and charged a wrongful intrusion upon, and claim of right by appellee under the Homestake location of, the ground in conflict. In its answer the appellee pleaded: First, a general denial; second, not guilty; and, third, the location of the Homestake, and its validity, by virtue of prior discovery and location, a full compliance with the laws of the United States and the Arizona statutes pertaining to the location of lode mining claims. The trial was had before a jury upon the issues thus made, and a verdict and judgment entered for the appellee. From an order overruling his motion for a new trial, and from the judgment, Wiltsee appeals to this court.

The Homestake mining claim location was initiated February 15, 1897, by one Eichelberger, who, as the testimony shows, called himself, "for convenience' sake," Charles Edwards. On this date Eichelberger erected a monument, and placed therein the following notice: "Notice of Homestake Lode. We claim by discovery 1,500 feet along this vein and 300 feet on each side of this notice. We claim 150 feet in a westerly direction and 1,350 feet in an easterly direction. Located this day, the 15th day of February, 1897, by Charles Edwards and H. B. Gleason." One of the disputed questions of fact upon the trial was as to whether, at the time Eichelberger initiated this location, he erected any other monument than the one in which the notice was placed. The appellant sought to prove that, in addition to the initial monument, Eichelberger erected one at the easterly end of the claim; that subsequently, after the location by appel-

lant's grantors of the Black Iron and Iron Mask mining claims, he shifted the easterly end from the point where the original monument was claimed to have been placed to a point about eight hundred feet northerly, taking in, in this way, the area of conflict between the Homestake and the Black Iron and Iron Mask. The contention of the appellee was that no monuments were built at the time of the discovery and location of the Homestake except the initial monument, until late in February, when Eichelberger and one Guerra built one on the west end-line; and that no monument was erected on the east end-line of the claim until March 23d, when Eichelberger completed the location of the claim by the erection of the other monuments required to fully mark out the boundaries of the claim.

The assignment of errors made by appellant presents two questions for our consideration: First. Assuming that Eichelberger changed subsequent to his discovery and initial location of the Homestake, and within the ninety days required of the locator to perfect his location, the course of his location, by moving the easterly end-line thereof so as to include portions of the Black Iron and Iron Mask claims, under his location notice, did Eichelberger possess the right to make such change, and take in any portion of the Black Iron and Iron Mask mining claims? Second. If a consideration of the first proposition leads to the conclusion that Eichelberger possessed no such right, then did the trial court correctly instruct the jury upon this question?

At the time of the location of the Homestake by Eichelberger act No. 42 of the Laws of 1895 was in force. The first six sections of this act pertain to the location of lode mining claims, and these read as follows:—

“Section 1. Every notice of location of a mining claim shall contain: First, the name of the claim located; second, the name of the locator; third, the date of location; fourth, the number of feet in length of said claim and the number of feet claimed on each side of the center of the discovery shaft, lengthwise of the claim; fifth, the general course of the lode deposit or premises located; sixth, the locality of the claim with reference to some natural object, or permanent monument, as will identify the claim.

“Sec. 2. All mining locations hereafter located, the cer-

tificate of location of which shall not contain: First, the name of the lode, or premises; second, the name of the locator or locators; third, the date of location; fourth, the number of feet in length of said claim and the number of feet claimed on each side of the center of the discovery shaft, lengthwise of the claim; fifth, the general course of the lode, or premises, as near as may be; sixth, the locality of the claim with reference to some natural object, or permanent monument, as will identify the claim, shall be void.

"Sec. 3. Before filing such location certificate with the county recorder of the proper county, the discoverer shall locate his claim by: First, sinking a discovery shaft upon the premises, so claimed, to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and deeper if necessary, until there is shown by such work a lode deposit or mineral in place; second, by posting at the point of discovery, on the surface, a plain sign or notice substantially conforming to the location certificate; third, by marking such claim or premises on the ground so that its boundaries can be readily traced.

"Sec. 4. Such surface boundaries shall be marked by eight substantial posts, projecting at least three feet above the surface of the ground, or by substantial stone monuments at least three feet high, to wit: one at each corner of said claim, and one at the center of each end and side line thereof.

"Sec. 5. Any open cut, cross-cut, adit or tunnel, which shall be made as above provided for, as a part of, the location of a mining claim, and which shall be equal in amount of work to a shaft ten feet deep and four feet wide by six feet long, and which shall cut a lode or mineral in place at the depth of ten feet from the surface, shall be equivalent, as a discovery work, to a shaft sunk from the surface.

"Sec. 6. The discoverer shall have ninety days from the date of discovering the lode and the posting of the notice thereupon, to perform said discovery work thereon."

The various provisions of these sections as to what is termed "notice of location" and "certificate of location" are somewhat confusing. The notice of location provided for in section 1, among other things, provides that it shall contain the number of feet in length of said claim, and the number of feet claimed on each side of the center of the discovery shaft,

lengthwise of the claim. But this discovery shaft, as provided in section 6 of the act, may be sunk the requisite number of feet at any time within ninety days from the date of the discovery of the lode and the posting of the notice thereon. Again, it is provided in section 3 of the act, among other things, that before the location certificate be filed for record the locator shall post at the point of discovery on the surface a plain sign or notice substantially conforming to the location certificate. That this latter notice is the same as that referred to in section 1 seems probable from the provisions as to what it shall contain. The confusion arises out of the uncertainty of these provisions of the statutes as to when the notice of location mentioned in section 1 and section 3 must be posted on the claim, and whether a mining claim may be initiated in advance of the posting of such notice. It is difficult to understand how it would be possible for this preliminary notice to set forth the number of feet claimed on each side of the center of the discovery shaft lengthwise of the claim in advance of the sinking of such discovery shaft; and this, as we have noted, may be done at any time within ninety days from the date of discovering the lode and the posting of the notice thereon. It is contended by counsel for appellee in their brief that the notice mentioned in section 6 is not the same as referred to in sections 1 and 3; that the former must be construed as referring to some preliminary notice which the locator posts at the time of discovery, and that the latter has reference to the perfected notice of location which he is required to make and post within ninety days thereafter, and before the filing of the certificate of location described in section 2 of the act. Whether this view of the statute be the correct one, we do not find it necessary to decide, for the reason that the sufficiency of the notice of location made by Eichelberger posted on the claim at the time of the discovery of the lode is not raised by appellant. On the contrary, his contention is that the notice of location first posted defined with such particularity the course of the claim lengthwise that its direction could not thereafter be changed to the prejudice of intervening locations. The question, therefore, under this contention becomes one of construction of the language used in the notice of location of the Homestake, "We claim 150 feet in a westerly direction and 1,350 feet in an easterly direc-

tion." Notices of location have been liberally construed by the courts. It is recognized that miners have but scant opportunity of definitely locating and describing locations when these are made, as frequently happens, in remote and but little-known localities; and the physical conformation of the country may be such as to require much time and labor to determine the true course and strike of the mineral-bearing vein or lode which may be the subject of the location. The same strictness in construing a clause in a notice of location required in construing a deed would obviously be unfair and unjust to the miner. Regard should be had to the meaning which the terms "easterly" and "westerly" are given by the miners. There is no rule of necessity, such as exists in the construction of a deed, which requires that the term "easterly," used without qualifying language, shall denote due east, and the term "westerly" shall denote due west. In the sense in which "easterly" is used by the miner and prospector, the term denotes the general course of a vein or location running nearer towards the east than any of the other cardinal points of the compass. A notice of location, therefore, which gives the course of the location as running westerly so many feet and easterly so many feet from a discovery shaft or point of discovery, until boundaries are definitely located by the erection of monuments, must be held to reserve from entry by subsequent locators the surface area which might be included within any location so made that, were a line drawn lengthwise through the center of said claim from the west center end through the point of discovery to the east center end of said claim, said line would lie at some point between east forty-five degrees north and east forty-five degrees south from the point of discovery. Should, however, the locator, at the time of posting his notice, in addition to giving the general course of his vein, place monuments at the center of each end-line, and thus definitely give notice to subsequent locators as to the meaning and intent of the language used in his notice as to the general course of his location, we think, under the law, he is bound by the location thus made and defined, so that he may not thereafter, and during the ninety days permitted for the perfection of his location, change the course of his location to the prejudice of intervening rights. It would be unjust to permit a locator who has

thus marked out the course and direction of his location with certainty to include subsequently, by a change in the course of his location, discoveries of mineral and parts of locations which others may have made, relying upon the express representations of the prior locator as to the extent of his rights.

Applying these views to the case at bar, assuming that Eichelberger, at the time of posting the notice in question, erected no other monuments than the one at the point of discovery, his subsequent location of the east center end monument of the Homestake at the point now claimed for it was a substantial compliance with the notice of location, and no intervening rights to the ground in controversy were acquired by Wiltsee's grantors through their location of the Black Iron and Iron Mask claims. If, however, Eichelberger, at the time of posting his location notice, erected a monument at the center of the east end-line, such end-line could not thereafter be changed so as to include within the boundaries of the Homestake any portion of the Black Iron and Iron Mask which would not otherwise have been included had the east end-line of the Homestake remained as established by Eichelberger. The record discloses a sharp conflict of evidence as to whether or not Eichelberger had, prior to the location by Cain and O'Brien, fixed the center of the east end-line of the Homestake by the erection of a monument and the placing of a notice thereon. It was left, therefore, to the jury to determine this question of fact, and for the court to instruct the jury as to the effect of such change in location upon the rights of the parties to the ground in conflict. Upon this question the court instructed the jury as follows: "If the jury shall believe from the evidence in this case that the witness Eichelberger erected two monuments on the alleged Homestake mining claim, designated on the map as the 'Original Homestake Claim,' one being at about the center of the westerly or northwesterly end of said claim, and the other at about the center of the easterly or southeasterly end-line of said claim; that he placed a notice in one or the other or in both of said monuments, wherein the claim was described as lying three hundred feet on each side of said location,—then the court instructs the jury that said claim could not thereafter be moved, nor its lines changed, so as to infringe on ground that had been located before such change. Therefore,

if the jury shall believe from the evidence in this case that Eichelberger did discover mineral-bearing rock in place carrying gold; that, after such discovery, he erected two monuments on said claim, one at about the center of the westerly or north-westerly end-line of said claim and the other monument at about the center of the easterly or southeasterly end-line of said claim; and that in one of said monuments, or in both of them, he placed a notice naming said claim the Homestake, and therein claiming the same as being three hundred feet wide on each side of said locating monument; and that the alleged location of said Black Iron and Iron Mask claims, as said claims were located, if they were lawfully located, did not include any ground within the lines of the said Homestake if the same were located as above; and that, after said alleged locations, and all of them, said Eichelberger did swing the said Homestake claim on to new grounds, and that such new grounds include the grounds herein,—then you will find for the plaintiff.” This instruction, as we conceive, clearly gave the law governing the case. Upon the same subject the appellant requested the court to give the following instruction in addition to the above (fourteenth instruction): “The court instructs the jury that the law requires the location notice to substantially conform to the location certificate. If, therefore, you shall believe from the evidence in this case that Eichelberger swung the easterly end of the Homestake claim where it was located by the location notice, if it was so located by said notice, to a place northerly not less than eight hundred feet, where it was fixed by the location certificate, then this change is not a substantial compliance with the location notice, such change is void, and the ground in conflict is not the ground of the defendant.” The latter request was refused by the court, and, we think, properly so, for the reason that, as we have seen, the location notice, as posted, did not definitely locate the easterly end of the Homestake claim, and under the law Eichelberger had the right, within ninety days after initiating his claim, to locate his easterly end of the Homestake at any point thirteen hundred and fifty feet in an easterly direction from the point of discovery, unless he had, prior to the location of the ground in conflict by Cain and O’Brien, definitely located the same by the erection of a monument and the placing of a notice therein.

The validity of another location, called the "World," made by Eichelberger, was brought into the case by appellee upon the theory that it included the point of discovery of the Iron Mask, and, being a prior location, made the latter an invalid one. The general verdict of the jury, in effect, was a finding that the Homestake, as surveyed for patent, substantially conformed in its general course to the original location, and, this being true, the validity or invalidity of the World location becomes of no consequence, so far as the rights of the appellant are concerned. It becomes unnecessary, therefore, to the right determination of this appeal, to pass upon the instructions given and those refused upon the request of the appellant which pertain to the subject of the World location. We find no reversible error in the record, and the judgment is therefore affirmed.

Doan, J., and Davis, J., concur.

[Civil No. 718. Filed March 28, 1900.]

[60 Pac. 871.]

MARICOPA AND PHOENIX AND SALT RIVER VALLEY RAILROAD COMPANY, a Corporation,
Defendant and Appellant, v. **MERTIE LEE DEAN,**
Administratrix of the Estate of George H. Dean,
Deceased, Plaintiff and Appellee.

1. **APPEAL AND ERROR—PERSONAL INJURIES—NEGLIGENCE—VERDICT—WILL NOT BE DISTURBED WHERE CONFLICT OF EVIDENCE—ANDERSON v. TERRITORY, 6 ARIZ. 185, 56 PAC. 717—TERRITORY v. MIRAMONTES, 4 ARIZ. 179, 36 PAC. 35, FOLLOWED.**—In an action to recover damages for injuries resulting in death through the negligence of defendant railroad company, the case turned upon the fact whether or not the statutory requirement, making it mandatory upon railroad corporations to cause a bell to be rung upon approaching a crossing for a distance of not less than eighty rods from the same was complied with. The verdict of the jury based upon contradictory testimony is that it was not, and this court is not at liberty to disregard the verdict upon a disputed question of fact where there is any evidence to support it. Cases, *supra*, followed.

2. PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

—In an action for damages for personal injuries the burden of proving contributory negligence is upon the defendant.

3. SAME—SAME—EVIDENCE—CREDIBILITY OF WITNESS.

—The testimony of two witnesses as to admissions of the driver of the vehicle in which decedent was when struck by defendant's train, contradictory to his testimony that he looked and listened before attempting to cross, is not binding upon decedent, but only goes to the driver's credibility as a witness, which is purely within the province of the jury, and not subject to review on appeal, and does not make out a case of contributory negligence sufficient to warrant a reversal, though corroborated by other evidence.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. **Affirmed.**

The facts are stated in the opinion.

Kibbey & Edwards, for Appellant.

Baker & Bennett, for Appellee.

SLOAN, J.—The only error assigned by appellant in this case is that the verdict of the jury was not sustained by the evidence. The appellee, as the administratrix of the estate of George H. Dean, deceased, brought suit against the appellant to recover damages for injuries resulting in the death of said George H. Dean, deceased,—caused, as alleged by her in her complaint, through the negligence of the railroad company. The suit was brought by the plaintiff, under the statute, in behalf of herself, as the widow of said Dean, deceased, and as well in behalf of two children, the issue of the marriage between her and said deceased. It appears that on the morning of the 14th of May, 1898, George H. Dean, in company with one Horace Bliss and one Bert Toney, was driving into Tempe on the highway between the villages of Mesa and Tempe, riding in a farm wagon drawn by two horses. Bliss was the driver of the conveyance. While crossing the railway track near Tempe the wagon was run into by appellant's train and Dean and Toney killed and Bliss seriously injured. The railroad crossing where the accident occurred was within the limits of the village of Tempe. It appears that the Hay-

den Canal parallels the railway track at this point, about one hundred and thirty-five feet to the north. At the place where the wagon-road crosses the ditch the latter is spanned by a bridge. Near the track, and in the direction from the bridge from which the train came on the morning of the accident, there was at that time a row of cottonwood trees, which at least partially obstructed the view. The question of the negligence of the railroad company turned upon whether or not sufficient warning was given of the approach of the train by the ordinary method of whistling for the crossing and the ringing of the bell. Under the assignment of error our inquiry, therefore, is necessarily limited to an examination of the record for the purpose of ascertaining whether the testimony on this point is sufficient to sustain the verdict, and the further question whether the deceased or Bliss, the driver of the wagon, was guilty of contributory negligence.

Bliss testified that on reaching the bridge he almost stopped his horses and looked and listened for the train, but neither saw nor heard it; that from this point until he reached the track the latter was obscured, in the direction from which the train came, by the row of cottonwood trees; that from the bridge towards the track there was first a sharp descent and then an equally sharp ascent to the track; that while in the hollow between the bridge and the track he again stopped and looked and listened for the train, and again neither heard nor saw it; that he then started across, and just as he was going on to the track, for the first time, he saw the approaching train, when it was too late to do anything but jump. John Knight, a witness for plaintiff, testified that at the time of the accident he was standing on the outside of his store building in Tempe, talking to a Mr. Woodmansee, and saw the train pass his place immediately before it reached the crossing where Dean was killed, which was in sight, and about three hundred feet distant; that about three hundred yards from the crossing the train gave one short whistle; that it was then running at about the rate of twenty or twenty-five miles an hour; that the bell was not ringing when it passed the point where he stood. This witness corroborated Bliss as to the presence along the track of the row of cottonwood trees, and that at the time of the accident the view from the bridge to the track in the direction from whence the train came on

the morning of the accident was obstructed by these trees and the undergrowth about them. Woodmansee corroborated Knight as to the speed of the train, and the former's statement that the bell was not ringing at the time the train passed the former's store, but testified that he heard no whistle. His statements with regard to the obstruction to the view caused by the trees and undergrowth also corroborated the testimony of both Bliss and Knight. Other witnesses (among them, the brakeman and express messenger of the train) testified either that the bell was not rung, or that they did not hear it, immediately before the accident. On the part of the defense, numerous witnesses testified to having heard the whistle of the train before it reached the crossing. Both the engineer and the fireman testified that they whistled for the crossing, and that the bell was ringing before the train reached the crossing, and at the time of the accident. Two or three of the passengers who were on the train corroborated the statements of the engineer and fireman. Other witnesses for the defense testified that they saw the wagon, driven by Bliss, just before it was struck by the train; that Bliss, the driver, seemed to be urging his horses up the grade and across the track, as if he knew of the approach of the train, and was trying to cross the track in advance of it. The doctor who attended Bliss testified that the latter, after the accident, stated that he heard the train coming, but thought he could cross before it could reach him, but made a mistake and got caught. One Leonard Berg also testified to a similar admission on the part of Bliss. The witness Bliss denied having made these admissions. Upon the question of the negligence of the railroad company, as we have said, the case turned upon the fact whether or not the statutory requirement, making it mandatory upon railroad corporations to cause a bell to be rung upon approaching a crossing for a distance of not less than eighty rods from the same, was complied with in this instance. The reading of the cold record does not present a strong case in favor of the contention of the appellee that the bell was not rung as required by the statute, and if we were to decide that question with no regard to the finding of the verdict it would be against that contention. There was, however, testimony to support it. The witnesses Knight and Woodmansee were both positive in their statements that the bell was not rung while pass-

ing the former's store building, which, as we have seen, was within three hundred feet of the crossing. We are not at liberty to disregard the verdict of the jury upon a disputed question of fact, where there is any evidence which supports it. *Anderson v. Territory*, 6 Ariz. 185, 56 Pac. 717; *Territory v. Miramontez*, 4 Ariz. 179, 36 Pac. 35.

Upon the question as to whether or not the occupants of the wagon by their own negligence contributed to the accident the burden of proof was upon the appellant. The case for the appellant upon this question rested upon the admissions of the witness Bliss, and his conduct as testified to by certain eye-witnesses, from which the inference might be drawn that he had seen the train, or heard it, but undertook to cross the track in advance of its reaching the crossing. The admissions of Bliss could not bind the plaintiff in the action, and only went to his credit as a witness. It was purely within the province of the jury to determine the credibility of the witnesses, and it is not a question for this court to determine upon the appeal. We cannot say, as a matter of law, that the jury were wrong in believing Bliss, and in discarding the testimony of the impeaching witnesses. In our judgment, there is enough testimony in the record to support the verdict, and the judgment is therefore affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 721. Filed March 28, 1900.]

[60 Pac. 872.]

SAMUEL W. FINLEY et al., Defendants and Appellants, v.
CITY OF TUCSON, Plaintiff and Appellee.

1. PRACTICE—DEMURRER TO ANSWER—JUDGMENT ON PLEADINGS—MILES v. MCCALLAN, 1 ARIZ. 491, 3 PAC. 610, APPROVED.—There is no express provision in our statute for a demurrer to the answer, and judgment may be rendered upon the pleadings when the answer does not deny any of the material allegations of the complaint, nor set up new matter constituting a defense.
2. BONDS—STATUTORY—COMMON LAW—VALIDITY—CONTESTED ELECTION—PARR. 1732, 1750, 3065, REV. STATS. ARIZ. 1887, CONSTRUED.—

Pending an appeal in a contest to determine who was elected city marshal, defendant gave a bond to refund any salary paid him by the city if declared not entitled to the office. Paragraph 1732, *supra*, provides for contests of elections, and paragraph 1750, *supra*, makes provision for such a bond, except that it uses the word "county," and does not in specific terms extend to any other political subdivision. Defendants set up no defense to the bond other than that it was without legal authority. *Held*, that as under paragraph 3065, *supra*, the defendant could not have received money for his services as city marshal from the city pending the appeal, unless he made a contract protecting the city in the payment of such salary, the bond was valid even though not a statutory bond, and he and his sureties were responsible thereon.

3. SAME—TO REFUND SALARY—MEASURE OF LIABILITY.—Defendant executed a bond conditioned to refund the salary paid to him as city marshal by the city pending an appeal, provided he was declared not entitled to the office. *Held*, that the terms of the bond are controlling, and all salary must be refunded, and not merely any damages which the city might have suffered.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Appellants.

Judgment on pleadings is only proper where the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced. 11 Ency. of Plead. & Prac., p. 1030.

This is not a case where judgment on the pleadings could be properly granted, for the reason that, while the defendants admit the execution of the bond sued on, they allege in their sworn answer that the bond was exacted by the plaintiff from defendant without any legal authority, and was not executed and delivered for any good and valid consideration. The effect of such allegation put in issue the proper execution and delivery of the bond, denied the consideration, and denied the validity of the bond. *Prost v. More*, 40 Cal. 347.

The answer alleges that the defendants had tendered to the plaintiff the only damage or emoluments which had been lost to defendant,—to wit, the difference between one hundred dollars per month paid to Finley and eighty-five dollars per

month paid to Oakes. This was a denial that defendants were liable under the bond for more than fifteen dollars per month—a denial that they owed the city \$1,249.27 as alleged.

The effect of such answer was to set up new matter constituting a defense, and it was held by this court in *Miles v. McCallan*, 1 Ariz. 491, 3 Pac. 610, that "Judgment on the pleadings cannot be rendered when the answer under oath denies any of the material allegations of the complaint or sets up new matter constituting a defense."

The breach of a bond conditioned for the performance of a specified act does not give the obligee an absolute right to recover the amount named; when such a breach occurs he should sue for and recover only the damages actually sustained. *Ripley v. Eady*, 106 Ga. 422, 32 S. E. 343.

This bond was exacted of Finley by the city, and there is no statutory authority for such a bond. Section 1750 is to be strictly construed, and applies wholly to county offices; says bond shall run to the county, be approved by the chairman of the board of supervisors, and shall be conditioned that the principal will refund to the treasurer of the county any salary he may have received. *People v. Cabanne*, 20 Cal. 525.

"Where statute requires a bond to be payable to the state, and it is taken payable to the governor it is void." *Lawton v. State*, 5 Tex. 270.

"Where a bond is taken by an officer or court acting simply under statutory authority the instrument must be authorized by statute or it will be void." *Byers v. State*, 20 Ind. 47.

"A bond executed in the course of a judicial proceeding is not valid as a statutory or common-law obligation where the court or officer who took it had no authority to take it." *Couchman v. Lisle*, 17 Ky. Law Rep. 1295, 33 S. W. 940.

C. W. Wright, and Rochester Ford, for Appellee.

Bonds intended to be taken in compliance with statutes, although not done so, if entered into voluntarily and founded upon a valid consideration, and do not violate public policy or contravene any statute, will be enforced by common-law remedies. *Palmer v. Vance*, 13 Cal. 553; *Munter v. Reese*, 61 Ala. 395; *Bunneman v. Wagner*, 16 Or. 433, 8 Am. St. Rep. 306, 18 Pac. 842.

Although a constable's bond is given to the treasurer of a

city instead of to the city, as required by statute, yet being voluntarily executed, and there being nothing in the condition contrary to law, it is a valid bond at common law. *Farr v. Rouillard*, 172 Mass. 303, 52 N. E. 443.

STREET, C. J.—In December, 1896, an election was held in the city of Tucson for the election of city officers. George W. Oakes and the appellant Samuel W. Finley were candidates for the office of city marshal. Upon the return and canvass of the votes cast at said election it was decided that Oakes had received the largest number of votes cast, and a certificate of election was given him therefor. The appellant Samuel W. Finley contested the election in the district court in and for Pima County, and, as the result of such contest, obtained a judgment and decree from said court declaring and adjudging him to be entitled to hold the office of city marshal, and that Oakes be ousted therefrom. Oakes appealed from said judgment to the supreme court of the territory, and obtained a reversal of the judgment of the district court, and a judgment that the district court enter a judgment for the contestee, Oakes. *Oakes v. Finley*, 5 Ariz. 390, 53 Pac. 173. Pending the appeal, Finley was desirous of drawing the salary attached to the office of city marshal, and gave a bond to the city of Tucson, appellee, in the sum of twenty-four hundred dollars, with the other appellants, William H. Barnes, James Finley, and Rosario Brena, as sureties. The condition of the bond is as follows, to wit: "The condition of the above obligation is such that whereas, on the ninth day of January, 1897, in the district court of the first judicial district of the territory of Arizona in and for Pima County, in an action pending therein wherein Samuel W. Finley is contestant and George W. Oakes is contestee, the said Finley was adjudged to be the duly elected city marshal of the said city of Tucson; and whereas, the said George W. Oakes has taken an appeal from said judgment to the supreme court of the territory of Arizona; and whereas, the said Samuel W. Finley is desirous of receiving the salary for his services as such city marshal from the city of Tucson during the pendency of such appeal: Now, therefore, if, on appeal, or any new trial of said cause, he, the said Samuel W. Finley, be adjudged or decreed to be not entitled to such office, and if he,

the said Samuel W. Finley, shall refund to the treasurer of said city of Tucson any money he may have received from the said city of Tucson as compensation or salary for his services as such city marshal, rendered as such officer during the term of office contested, together with the costs of suit which may be brought on this bond, then this obligation to be void; otherwise, to remain of full force and virtue." After judgment of the supreme court was entered reversing the judgment of the district court, and ordering the district court to enter judgment in favor of Oakes, contestee, the city of Tucson made demand on Finley and his sureties for the reimbursement to the treasurer of said city of \$1,249.27, the amount paid by said city to and received by said Finley as city marshal, and, not receiving payment, brought this action for said amount and costs of suit. Defendants filed their answer to the complaint, and, without denying any of the allegations of the complaint, they alleged that the bond was given by Finley to the city of Tucson without authority of law, and, that being the case, it was without valuable consideration, illegal, and void. They further alleged that Oakes, during the pendency of the appeal, was employed by the city of Tucson, and received compensation from the city at the rate of eighty-five dollars per month; that the salary of city marshal was one hundred dollars per month, and that Oakes could collect from the city only the difference between eighty-five dollars per month and one hundred dollars per month, as that was the only injury or damage which he had sustained; that Finley had tendered to the city of Tucson the sum of fifteen dollars per month during the time he had occupied the office of city marshal and drawn the salary and emoluments thereof. Plaintiff filed its motion asking for judgment on the pleadings, and, when the cause came on to be heard, judgment was so rendered for the plaintiff against the defendants, the appellants herein.

Judgment upon the pleadings is a practice recognized by the courts of Arizona. *Miles v. McCallan*, 1 Ariz. 491, 3 Pac. 610. There is no express provision in our statute for a demurrer to the answer, and judgment may be rendered upon the pleadings when the answer does not deny any of the material allegations of the complaint, or does not set up new matter constituting a defense. *Botto v. Vandament*, 67 Cal. 332, 7

Pac. 753; *Hicks v. Lovell*, 64 Cal. 17, 49 Am. Rep. 679, 27 Pac. 942; *Prost v. More*, 40 Cal. 347. The answer of these appellants, as defendants in the district court, set up no defense to the bond, only that it was given without legal authority, stating wherein. The bond sued on is not a statutory bond, nor one given in pursuance of any statute, unless it may have been in pursuance of paragraph 1750 of the Revised Statutes (chapter 16, entitled "Contesting Elections"). Paragraph 1732, which is section 1 of chapter 16, entitled "Contesting Elections," provides: "Any elector of a county, city or any political subdivision of either may contest the right of any person declared elected to an office to be exercised therein, for any of the following reasons," etc. Finley's contest was controlled by the provisions of that chapter. Paragraph 1750 makes provision for just such a bond as was given in this case, except that it uses only the word "county," and does not in specific terms extend to any other political subdivision. Yet, if the bond given by the contestant in this case was not a statutory bond, it was a common-law bond. It is provided by statute (par. 3065) that: "When the title of the incumbent of any office in this territory is contested by proceedings instituted in any court for that purpose, no warrant shall be drawn or paid for any part of his salary or compensation, except when otherwise provided by the law relating to contesting elections, until such proceedings have been finally determined." That paragraph applies to contests which are made for the purpose of obtaining reversals of decisions of returning boards in reference to city officers as well as county officers. Finley could not have received money for his services as city marshal from the city, pending the appeal, unless he had made a contract protecting the city in the payment of such salary. This he did voluntarily, as appears from the bond, and he and his sureties are responsible upon the obligation.

The bond also measures the obligation to the city in such a way as to dispose of the further answer of the defendants,—to wit, that the city could recover, or ought to recover, the difference only between the amount Oakes did receive from the city for other services rendered and the fixed salary for city marshal. There might be something in the contention of the appellants if the bond provided that Finley would hold the

city free from damages, or would pay whatever loss the city might suffer from paying the salary to him pending the appeal; but such are not the terms of the bond. The terms are that, if he does not succeed in his appeal, he will *refund* to the treasurer of the city the moneys which *he has received* as salary during the pendency of the appeal. In that particular it is different from a bond containing a penal amount conditioned to cover damages. This bond was not conditioned to pay the city what it may have lost by its indulgence, but it was to refund all that had been received; so that the city might not stand in a position to suffer loss or annoyance. The judgment of the district court is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 730. Filed March 28, 1900.]

[60 Pac. 891.]

W. A. HARWOOD, Defendant and Appellant, v. S. C. PERRIN, Plaintiff and Appellee.

1. OFFICE AND OFFICERS—ASSESSOR—RIGHT OF OFFICE—NOT A VESTED RIGHT—LEGISLATURE—POWER OF—ACT NO. 51, LAWS OF ARIZ. 1895, AS AMENDED BY ACT NO. 24, LAWS OF 1897, AND ACT NO. 63, LAWS OF 1899, CONSTRUED.—Act No. 51 of the Session Laws of 1895 was amended by act No. 24 of the Session Laws of 1897 so that in counties of the first and second classes the office of assessor should be filled by election. The second act was to go into effect January 1, 1899. At the general election held in November, 1898, appellant was elected assessor of Cochise County and entered upon the discharge of his duties January 1, 1899. On the 16th of March, 1899, the legislative assembly further amended act No. 51 of the Session Laws of 1895 by providing that in counties of the first and second classes an assessor shall be appointed by the board of supervisors for the years 1899-1900, the term of office to begin January 1, 1899, and that in 1900 and biennially thereafter an assessor should be elected. Act No. 63, Session Laws, 1899. Appellee, having been appointed under the last amendment, demanded the office from the appellant, elected under the first amendment. *Held*, that the last amendment did not impair any obligation of contract; that as the method of filling the office and duration of the term had not been regulated by Congress or constitutional

provision, the legislature had not deprived appellant of any vested right, and appellee was entitled to the office.

2. CONSTITUTIONAL LAW—SPECIAL AND LOCAL LAWS—CLASSIFICATION OF COUNTIES—ACT No. 63, 1899, LAWS OF ARIZONA, NOT IN CONFLICT WITH "HARRISON ACT," 1 SUPP. REV. STATS. U. S., P. 503.—Act No. 63, 1899, applying to counties of first and second class, the classification being based upon the equalized assessed valuation of the property, is not local or special so as to be in conflict with the provisions of the "Harrison Act," 1 Supp. Rev. Stats. U. S., p. 503; Organic Law of Arizona, Rev. Stats. Ariz., 1901, par. 63.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Charles Bowman, and William M. Lovell, for Appellant.

The following cases are cited as establishing that the classification attempted is local and special: *Bravin v. Mayor etc. of Tombstone*, 4 Ariz. 83, 33 Pac. 589; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Ewing v. Habletzelle*, 85 Mo. 75; *State v. Toole*, 71 Mo. 650; *State v. Wofford*, 121 Mo. 61, 25 S. W. 853; *Devine v. Commissioners Cook County*, 84 Ill. 590; *Kerrigan v. Force*, 68 N. Y. 381; *Desmond v. Dun*, 55 Cal. 242; *Conteric v. New Brunswick*, 44 N. J. L. 358; *State v. Gaddis*, 44 N. J. L. 363; *State v. Jersey City*, 45 N. J. L. 297; *Passaic County Freeholders v. Stevenson*, 46 N. J. L. 173; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *Müller v. Kister*, 68 Cal. 142, 8 Pac. 813; *State v. Justice Court*, 89 Mo. 237, 1 S. W. 307.

Barnes & Martin, for Appellee.

STREET, C. J.—The office of assessor, by the Revised Statutes of 1887, was filled by election, unless the board of supervisors of the various counties should by ordinance unite and consolidate that office with the office of sheriff. By the Revised Statutes of 1887 the counties were classified into first, second, and third class counties, based upon the number of registered voters. In section 1 of act No. 47 of the Session Laws of 1889 the legislature, by statute, made the sheriff of each county of the second and third classes *ex officio* assessor. The sheriff

being then an elective officer, the office of assessor was *ipso facto* elective in such counties. Act No. 51 of the Session Laws of 1895 classified counties into first, second, third, fourth, fifth, and sixth classes, based upon the equalized assessed valuation of property. Section 4 of said act made the office of assessor appointive by the boards of supervisors in first and second class counties, and fixed the term of office at one year; and in third, fourth, fifth, and sixth class counties, made the sheriff *ex officio* assessor. Act No. 51 of the Session Laws of 1895 was amended by act No. 24 of the Session Laws of 1897 so that in counties of the first and second classes the office of assessor should be filled by election at the same time and in the same manner as other county offices. But section 4 of said act No. 24 provides, "This act shall take effect and be in force from and after January 1, 1899." On the fifth day of January, 1898, W. A. Harwood, the appellant, was appointed by the board of supervisors of Cochise County as assessor of that county for the term of one year. At the general election in November, 1898, Harwood was a candidate for the office of assessor for Cochise County, and received the highest number of votes cast for said office, and received a certificate of election, and qualified as such assessor and entered upon the duties of the office on the first day of January, 1899. While Harwood was in office,—to wit, on the sixteenth day of March, 1899,—the legislative assembly made a further amendment to said act No. 51, and provided: "That in counties of the first and second class an assessor shall be appointed by the board of supervisors for the years 1899 and 1900, whose term of office shall be, in all first and second class counties, for the term of two years from the first day of January, 1899. That in the year 1900, and biennially thereafter, in counties of the first and second class, an assessor shall be elected at the same time and in the same manner as other county officers, whose term of office shall be, after the year 1900, two years, or until his successor shall have been elected and qualified." After the passage of that law (act No. 63 of the Session Laws of 1899),—to wit, on April 3, 1899,—the board of supervisors of Cochise County appointed the appellee, S. C. Perrin, as assessor for said county, under the provisions and by virtue of said act No. 63. After such appointment appellee, Perrin, filed his bond, took the oath of office, and made demand upon

Harwood for the office, and Harwood refused to deliver the same. Appellee, Perrin, then brought action in the district court of Cochise County to obtain possession of the office and to oust appellant therefrom, and upon the trial of the case obtained a judgment in his favor, from which judgment appellant, Harwood, appeals.

Appellant contends that although act No. 24 of the legislative assembly of 1897 provides that the act should not take effect until January 1, 1899, yet, so far as the election was concerned, it took effect immediately after its passage, and that his election at the general election of 1898 was a good and valid election, and that having been duly elected to the office, and having entered upon the discharge of its duties, he was the legally constituted assessor, and the legislature could not legislate him out of office by changing the manner of filling the office during his term; that act No. 63 of the legislative assembly of 1899 was local and special, and in violation of the inhibition contained in the act of Congress of July 30, 1886, commonly known as the "Harrison Act."

As to the first point, that it was beyond the power of the legislature to legislate him out of office, we regard it as the settled law that unless the method of filling the office, and the duration of the term, was one of constitutional provision, or unless regulated by act of Congress, the legislature would have full control of the method of appointment and the duration of the term. Arizona as yet having no constitution, but operating under powers delegated to it by Congress, the Organic Act and the congressional enactments supply for its legislature the limitation of power. Unless the act of the legislature was such as impaired the obligation of contracts, there is no constitutional or congressional provision controlling the matter. In the case of *Prince v. Skillin*, 71 Me. 361, reported in 36 Am. Rep. 325, there is a clear enunciation of this principle: "All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the legislature. There is, with the above exception, no vested right in an office or its salary. The office may be abolished. The mode of appointment may be changed. The length of time of official existence may be shortened. The compensation for official services may be diminished," and here cites *Farwell v. Rockland*, 62 Me. 298; *Butler v. Penn-*

sylvania, 10 How. 403, 13 L. Ed. 472; *Barker v. City of Pittsburgh*, 4 Pa. St. 51; *Conner v. City of New York*, 5 N. Y. 291; *Taft v. Adams*, 3 Gray, 126. The case of *Butler v. Pennsylvania*, 10 How. 403, 13 L. Ed. 472, is quite instructive in this connection. By authority of statute, the plaintiffs in error in that case were by the governor of the state appointed to the place of canal commissioners. The same statute directed that the appointment be made annually on the first day of each February, and the compensation of the commissioners was fixed at four dollars per diem each. Plaintiffs accepted the appointment and took office on the 1st of February, 1843. By a subsequent statute, on the 18th of April, 1843, the office of canal commissioner was made elective; and the appointing power taken from the governor; also, the per diem allowed each commissioner was reduced. The act took effect from and after its passage. The difference between that case and the one at bar is, that in the one instance the legislature changed the office from appointive to elective, and in the other from elective to appointive. It was held in that case that there was no contract between the state and the officers, and that the act of the legislature changing the method of filling the office, repealing the former act, and removing the officers appointed, and changing the rate of compensation, was not such an act as impaired the obligation of contracts. A learned judge has said that retroactive laws of every description neither accord with sound legislation nor the fundamental principles of the social compact. If it was the design of the legislative assembly of Arizona, by its act No. 63, to deliberately legislate men out of office, such action would be highly censurable, yet an exercise of power beyond the control of courts. Another learned judge has said that he "would be unwilling to consider any legislative act so intended, unless that intention was made manifest by express words, because it would be a violation of fundamental principles, which is not to be presumed." We have no idea that our own legislature intended to deliberately take away from an officer who had been elected by the people the emoluments of the office by legislating him out of office. When we consider that act No. 24 of the Session Laws of 1897 provided that it should not take effect until January 1, 1899, and that there was a great deal of doubt in the minds of many, and great confusion

among the various boards of supervisors, as to whether the assessor for the term commencing January 1, 1899, was elective or appointive, and boards of supervisors of the various counties made appointments irrespective of the election; when we consider this condition of the law, and the history surrounding the assessor's offices during that period,—the action of the legislature is easily explainable, in a conscientious effort to bring about certainty in regard to that office, and to place the legality of assessments made by the assessors of 1899 beyond any question of doubt.

As to the contention that act No. 63 was local and special, and comes within the inhibitions of the act of Congress, the decision of this court in the case of *Bravin v. Mayor etc.*, 4 Ariz. 83, 33 Pac. 589, seems to us to cover the question. The city of Tombstone was created by act of the general assembly of 1881. The act provided for a city assessor who should be *ex officio* tax and license collector, health officer, and street commissioner. Bravin was duly elected to the office, and was in the discharge of the various duties incident to it, when the legislature, in 1891, provided that in all cities in which the total vote cast at the general election held therein on the fourth day of November, 1890, was less than six hundred the functions of the city assessor, city tax-collector, city license-tax-collector, and street commissioner should be incident, *ex officio*, to the office of chief of police; thus legislating Bravin out of office. This court then held that if the act of 1891 was held valid it would operate as an amendment to the charter of the city of Tombstone; that the act of the legislature did not reach a class, but it reached only an individual city,—the only one in the territory to be reached by the act,—and was therefore local and special. The court further said that the classification of cities may be made, based upon population, upon the number of votes cast from time to time, upon the extent or character of particular business or industry done or pursued within its limits, etc., and this even though but one city in the territory comes within the provision of the statute at the time of the enactment. But the statute must be elastic, so that other cities might attain the requisite conditions, and come within the classification and operation of the statute. Legislation affecting such class is not local and special legislation. Act No. 63 related to classes, and specified

first and second class counties. In doing so, it reached counties other than Cochise, although the county of Cochise may have been the only county of the second class. The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Criminal No. 187. Filed March 28, 1900.]

[60 Pac. 876.]

WILLIAM HALDERMAN et al., Defendants and Appellants, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—CONTINUANCE—AFFIDAVITS—COUNTER AFFIDAVITS.—

Where defendants filed affidavits for a continuance on the ground that an absent witness, if present at the trial, would testify that deceased had threatened during a quarrel to take defendant's life, and that the whereabouts of said witness was unknown, but that defendant believed that said witness could be secured at a subsequent term of court if such continuance were granted, it was not error to permit the filing of counter affidavits by the prosecution tending to show that the witness had left the neighborhood prior to the quarrel, had never returned, and could not have heard the threats.

2. SAME—SAME—GRANTING OF—DISCRETIONARY.—The granting of a continuance for the purpose of securing the attendance of absent witnesses rests in the sound discretion of the court, and a denial would be justifiable if there was no showing made that the attendance of the witness could be procured at any subsequent date to which the trial could be postponed, or if, from counter affidavits, there was no good reason for believing that the witness would, if present, testify to the facts set forth in the affidavits for continuance.

3. SAME—MURDER—EYE-WITNESS—PROSECUTION NOT BOUND TO SUMMONS.—It is not error for the court upon a murder trial to refuse to compel the prosecution to call an eye-witness of the killing, as it is in the province of the prosecuting officer, and not of the court, to determine what witnesses shall be called in support of the charge against the defendant.

4. SAME—SAME—INSTRUCTIONS TO JURY—BURDEN OF PROOF—PAR. 1655, PEN. CODE, REV. STATS. ARIZ. 1887, CITED—FOSTER v. TERRITORY, 6 ARIZ. 240, 56 PAC. 738, FOLLOWED.—The statute, *supra*,

provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." *Held*, an instruction given in the exact language of this section was not error.

5. ~~SAME—SAME—SAME~~—PAR. 1655, PEN. CODE, REV. STATS. ARIZ. 1887.—The instruction that "where it is shown that a homicide has been committed with a deadly weapon, and no circumstance of mitigation, justification, or excuse appear, the law implies malice. The malice thus implied is that malice aforethought which is necessary to sustain an indictment for murder," states in different language the substance of paragraph 1655, *supra*, and aside from the statute is amply sustained by the authorities.
6. ~~SAME—SAME—SAME~~—DEFENDANT A WITNESS—CREDIBILITY.—It is not error for the court to give an instruction which in general terms advises the jury that in determining the credibility of the defendant as a witness they are at liberty to take into consideration the fact of his interest in the result of his trial, and in which there is no animadversion upon the testimony which he has given in the case.
7. ~~SAME—SAME—SAME~~—STATUTORY DEFINITIONS SUFFICIENT.—Where the court defined murder in the language of the statute, and gave the statutory definition of malice, it is not incumbent upon the court to supplement the statutory definition with one of his own, unless, perhaps, the defendant requests it and proffers an adequate and proper definition.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Marcus A. Smith, for Appellants.

It is the duty of honest prosecution to place on the stand every eye-witness of the homicide known to it, so that the jury may determine from *all* who saw it—not a *selected few*—what the real facts are. It is not the just province of a prosecution to secure a verdict. Its duty, like that of a judge, is to see that justice is done. Its duty is to shield the innocent and punish the guilty under due form of law. It can do neither by *selecting* its witnesses. It can do both by putting in the

witness-box *all* who saw the transaction. *Territory v. Hanna*, 5 Mont. 248, 5 Pac. 252.

The court charged: "On charge of murder, killing by defendant proved, the burden of proving mitigation . . . devolves on defendant," or, in other words, there is something presumed and taken by implication against the defendant. What is "presumed" by such an instruction? What is "taken by implication" in such language? *Murder* is presumed; *deliberation* is presumed; *willful killing* is presumed; *malice* is presumed; and not one of these things need be shown by the prosecution. No facts need be shown from which the jury might deduce these ingredients of murder, but only the killing need be proven; and the defendant is guilty of murder, unless he assumes a burden under which, by a preponderance of testimony, he must satisfy the jury, against *presumptions* raised, not by evidence, but by the illegal *ipse dixit* of the trial judge.

The law does not imply malice nor any other fact against the defendant. *Rush v. Commonwealth*, 78 Ky. 268.

In speaking of defendants' interest in the case, and commenting to their prejudice on it, the court, among other things, lays down the following as the law: "If their [the defendants'] statements be *convincing* and carry with them belief, *you have the right* to receive them and act upon them. If not [*convincing*] you have a right to reject them."

Why are the defendants selected for the judge's criticism, and why does he say of them and of no other witness that their testimony *must be convincing* before you have a right to receive it?

Chief Justice Fuller, while speaking for a unanimous court in the case of *Allison v. United States* (p. 399), says: "As a witness a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness." The court further say: "The wise and humane provision of the law that the person accused is a competent witness should not be defeated by a hostile instruction of the judge." *Allison v. United States*, 160 U. S. 896, 16 Sup. Ct. 252; *Hicks v. United States*, 150 U. S. 442, 14 Sup. Ct. 144; *Commonwealth v. Wright*, 107 Mass. 403; *Chambers v. People*, 105 Ill. 409; *Greer v. State*, 53 Ind.

420; *Veach v. State*, 56 Ind. 584, 26 Am. Rep. 44; *Buckley v. State*, 62 Mass. 705; *State v. Johnson*, 16 Nev. 36.

C. F. Ainsworth, Attorney-General, for Respondent.

The granting of continuance is a matter within the discretion of the court, and the refusal to grant a continuance will only be interfered with by an appellate court where it is plain that great prejudice has resulted to the defendant from such action. *State v. Rorabacher*, 19 Iowa, 154.

That the prosecution should be allowed to file counter affidavits to those in support of an application for a continuance, see *State v. Bevel*, 89 Iowa, 405, 56 N. W. 545; *People v. De Lacey*, 28 Cal. 590; *State v. McCoy*, 111 Mo. 517, 20 S. W. 240.

Even though a continuance asked on account of an absent witness had been wrongly refused by the lower court, the upper court would not interfere with the judgment, as it appeared clearly from the evidence that the defendant was guilty. *Cave v. State*, 33 Tex. Cr. 335, 26 S. W. 503.

The prosecution is not bound to place every witness on the stand; but only to place on the stand those who it thinks will make out its case. *State v. Martin*, 2 Ired. (N. Car.) 101; *Williford v. State*, 36 Tex. Cr. 414, 37 S. W. 762; *Kidwell v. State*, 35 Tex. Cr. 263, 33 S. W. 342; *Royens v. State*, 33 Tex. Cr. 143, 47 Am. St. Rep. 25, 25 S. W. 786.

That upon the proof of the homicide, the burden of proving circumstances of mitigation, etc., is upon the defendant, see Rev. Stats. Ariz., Pen. Code, sec. 1655; *United States v. Crow*, 3 Dak. 106, 14 N. W. 437; *State v. Byers*, 100 N. C. 512, 6 S. E. 420; *Sawyer v. People*, 91 N. Y. 667; *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96, 8 South. 98; *Commonwealth v. York*, 9 Met. 93, 43 Am. Dec. 373; *Smith v. State*, 86 Ala. 28, 5 South. 478; *Brown v. State*, 83 Ala. 33, 3 Am. St. Rep. 685, 3 South. 857; *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038.

SLOAN, J.—The appellants, William Halderman and Thomas Halderman, were jointly indicted, tried, and convicted of the murder of one Ted Moore at the June, 1899, term of the district court of Cochise County. The court, in accordance with the verdict of the jury, sentenced both defendants to be hanged. From the judgment of conviction, and

from the order overruling their motion for a new trial, the defendants bring this appeal.

It appears from the record that on April 6, 1899, a complaint was lodged before W. M. Monmonier, a justice of the peace for the precinct of Pierce, Cochise County, charging the Haldermans with having unlawfully killed cattle. A warrant of arrest was issued by the justice upon this complaint, and placed in the hands of one C. L. Ainsworth, constable of the precinct, and a deputy sheriff of the county. Ainsworth at once went to the Chiracahua Mountains, where the Haldermans live, for the purpose of serving the warrant of arrest. On his way he stopped at the house of one Smith, and asked the latter to accompany him to the home of the Haldermans. Ainsworth and Smith then went to the house of one Ted Moore, and, at the request of Ainsworth, Moore joined the party. The three then proceeded up the cañon from the home of Moore to the house of the Haldermans, and found the latter absent. They then went to the house of a neighbor by the name of Wilson, where they found the defendants. Ainsworth and Moore rode to the front of the Wilson house, dismounted from their horses, and called the Haldermans out, whereupon Ainsworth read his warrant of arrest to them. Both Haldermans expressed a willingness to go with the officer, but before starting, upon the suggestion of the latter, went into the house to get their breakfast. While they were inside, Ainsworth called to them, and told them, as they might be detained at Pierce for two or three days, to take with them such articles of wearing apparel as they might need. Soon after, the Haldermans appeared, one at each of the two front doors of the house, armed with rifles, and at once opened fire, instantly killing Ainsworth, and mortally wounding Moore. As to the facts above stated, there is no substantial conflict in the evidence. The testimony of the witness for the prosecution, supported by the dying declaration of Moore, as to the circumstances of the shooting, is to the effect that at the time the Haldermans appeared at the doors, Ainsworth and Moore were both mounted and a short distance from the house; that the Haldermans, as soon as they appeared, called to Ainsworth and Moore to hold up their hands, but, without waiting, at once fired; that Ainsworth immediately fell from his horse, shot through the heart; that Moore turned his horse, and

started off, but was shot through the bowels as he was riding away; that after the shooting the Haldermans immediately fled. The story, as told by the defendants, was, that between themselves and Moore there had existed a deadly enmity; that, after the warrant had been read, they asked the constable how they were to be taken to Pierce; that they were then told that they would have to walk down to a neighboring ranch, where there was a conveyance of some sort; that, fearing that Moore might on some pretext seek occasion on the way down to the ranch to do them harm, they concluded while in the house to take their rifles with them; that, as soon as they appeared at the front of the house, Moore pulled his gun and fired, that William Halderman at once returned the fire, and continued shooting until he had emptied his gun, and, as Moore continued to shoot, he then ran to the other door, where his brother, Thomas Halderman, stood, and, seizing the latter's gun, fired again at Moore, but by accident killed Ainsworth; that, fearing mob violence at the hands of the friends of Ainsworth, the two then left the country. The defendants were jointly indicted for the murder of Ainsworth, and also jointly indicted for the murder of Moore. Upon the latter indictment the defendants were tried and convicted. Before the trial the defendants made application for a continuance of the cause, based upon an affidavit made by one of the defendants, setting forth, in effect, that one Joseph Fisher, if present at the trial, would testify that in November, 1898, at or near the residence of the defendants, he (Fisher) was present at a quarrel between Moore and William Halderman, and heard Moore then threaten Halderman's life, and that subsequently, and before the homicide, on numerous occasions, he heard Moore make similar threats against Halderman; that the fact that Fisher would so testify was communicated to defendants' counsel immediately after the latter had been appointed by the court, and that a subpoena for Fisher was at once obtained, with an order from the judge of the court directed to the sheriff to summons Fisher out of the county, if not found therein; that the sheriff made return that the witness could not be found; that affiant last heard from Fisher about three months previous to the date of the application for continuance, and that the witness was then at Globe, Gila County, Arizona; that, if a

continuance were granted, the affiant believed he could obtain the attendance of Fisher at the trial at a subsequent term of the court. Counter affidavits were by the court permitted to be filed, tending to establish the fact that Fisher left the neighborhood where the defendants and Moore resided some time in July, 1898, and had not returned to that vicinity since that time; and, further, tending to show that Fisher could not have been present and heard the threats as set forth in the affidavit for continuance. The motion for continuance was by the trial court denied, and this ruling is assigned as error.

The practice of permitting counter affidavits to be filed upon a motion for continuance, although permissible, is one which should be confined to narrow limits. If the testimony of a witness whose absence is made the ground for the application for continuance be shown in the affidavit to be material, the truth of it cannot be controverted. If, however, the affidavit of the absent witness setting forth the nature of the testimony which, if present at the trial, he would give cannot be had, we see no reason for the exclusion of affidavits tending to show that there is no good reason for the belief that the witness, if present, would testify to the facts set forth in the motion and accompanying affidavits. Any other rule would operate to defeat justice in any case where a desperate defendant might find it to his advantage to obtain a postponement of his trial, and might choose to risk the pains and penalties of perjury in order to obtain it. Good faith in the application should appear, and the trial court, in order to wisely and justly determine whether justice to the defendant demands a continuance, should be permitted to look into the circumstances of the case, and judge whether diligence appears, and whether there be reasonable grounds for the belief that the attendance of the witness can be procured at a subsequent date, and, if the witness were present, he would give material evidence in the cause, whether these circumstances appear by affidavits presented by the applicant or by the opposing party. We do not find the admission of the counter affidavits to have been error. Nor do we think, from a review of the whole case, that the trial judge abused his discretion in denying the continuance. What his reason may have been does not appear. It may have been that no

sufficient showing was made for the belief that the attendance of Fisher, whose whereabouts were unknown to the defendants, and could not be ascertained by the sheriff, could be procured at any subsequent date to which the trial could be postponed, or at the subsequent term of the court; or it may have been that the trial court found from the counter affidavits that there was no good reason for believing that Fisher would, if present, testify to the threats as set forth in Halderman's affidavit. Whatever may have been the trial court's reason, we cannot, from the record, find such an abuse of discretion in the refusal to grant the continuance as to warrant a reversal of the cause.

During the examination of the witnesses for the territory, it appeared that one John Wilson was present at the time and place of the killing of Moore and Ainsworth, but the prosecution did not see fit to call Wilson as a witness. At the close of the case for the territory the defense moved the court for a rule requiring the prosecution to call Wilson as one of its witnesses. The motion was denied, and this ruling is made a ground of error by counsel for defendants in his brief. Bishop, in his work on Criminal Procedure (vol. 1, par. 966c), says: "Some courts deem that a prosecuting officer ought, in murder and other like causes, to call as witnesses all who were present at the transaction, whatever be the nature of their testimony; others regard it wholly within his discretion to produce such, and such only, as he thinks best." As was pointed out in *Kidwell v. State*, 35 Tex. Cr. App. 264, 33 S. W. 342, the rule requiring the prosecution to put on every witness who may have been present at the killing was a most humane and just one at the time when a defendant was denied the privilege of testifying in his own behalf and of producing witnesses for his defense. Under the modern procedure in criminal causes, and under the statutes of our territory, a defendant is not only privileged to testify in his own behalf, but has a right to the compulsory process of the court to compel the attendance of witnesses whom he may desire to examine in his defense. He is thus put on an equality with the territory in preparing his defense and in producing evidence. There appears to us, therefore, no good reason for adhering to a rule of practice which is no longer of any efficacy in securing to a defendant a fair and impartial

trial, but which, on the contrary, might often operate to embarrass and injure the territory in the prosecution of crime. We therefore hold with those courts which take the modern view that it is in the province of the prosecuting officer, and not of the court, to determine what witnesses to a transaction shall be called in support of the charge against a defendant. Numerous assignments of error are made in the brief of counsel for appellants, and argued by him, based upon the giving of certain instructions by the trial court, and the rejection of others offered by the defense. The first of these is in the exact language of section 1655 of the Penal Code. This instruction, in addition to having the sanction of the statute, was approved by us in *Foster v. Territory*, 6 Ariz. 240, 56 Pac. 738. The following language of the court is objected to as containing error: "You are instructed that, where it is shown that a homicide has been committed with a deadly weapon, and no circumstances of mitigation, justification, or excuse appear, the law implies malice. The malice thus implied is that malice aforethought which is necessary to sustain an indictment for murder." This instruction, as we conceive, states in different language the substance of said section 1655, and, aside from the statute, is amply sustained by the authorities. Upon the subject of the credibility of witnesses, as a part of his charge, the court gave the following: "The defendants have offered themselves as witnesses in their own behalf. The statutes give to them that right, and you should consider their testimony as you would that of any other witnesses. However, in determining the credit to be given their testimony you may consider the very great interest which they must have and feel in the result of this case, and the effect which a verdict would have upon them, and determine to what extent, if at all, such interest may color their testimony or affect their credibility. If their statements be convincing, and carry with them belief in their truth, you have the right to receive and act upon them; if not, you have a right to reject them." This instruction has been repeatedly approved of by the supreme court of the state of California, and similar instructions have been passed upon and sanctioned by the courts of last resort in other states. We are cited to two cases decided by the United States supreme court as condemning this instruction. The first is that of *Hicks v.*

United States, 150 U. S. 442, 14 Sup. Ct. 144, 37 L. Ed. 1137. The instruction passed upon in this case was as follows (150 U. S. 452, 14 Sup. Ct. 147, 37 L. Ed. 1141): "The defendant has gone upon the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you consider it in the light of the other evidence, in the light of the other facts. If he is contradicted by other reliable facts, that goes against him, goes against his evidence. You may explain it, perhaps, on the theory of an honest mistake or a case of forgetfulness, but if there is a conflict as to material facts between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses. You are to consider his interest in this case. You are to consider his consequent motive, growing out of that interest, in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case; the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth. We might be led away from the truth because of our desire. Therefore it is but right, and it is your duty, to view the statements of such a witness in the light of his attitude and in the light of other evidence." The court, in condemning this instruction, used this language: "The learned judge therein suggests to the jury that there was or might be 'a conflict as to material facts between the statements of the accused and the statements of the other witnesses who are telling the truth,' and that 'then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses.' The obvious objection to this suggestion is in its assumption that the other witnesses, whose statements contradicted those of the accused, were 'telling the truth.'" As to the other part of the instruction, the court proceeded to say: "If this were the only objectionable language contained in the charge, we might hesitate in saying that it amounted to reversible error. It is not unusual to warn juries that they should be careful in giving effect to the testimony of ac-

complices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person." The other case cited upon this point is that of *Allison v. United States*, 160 U. S. 203, 16 Sup. Ct. 252, 40 L. Ed. 395. The instruction in the latter case which was held to be erroneous read as follows: "The defendant has gone upon the stand, and he has made his statement. See if it is in harmony with the statements of witnesses you find to be reliable. If they are not, they stand before you as contradicted. If they are, they stand before you as strengthened, as you may attach credit to the corroborating facts. In passing upon his evidence, you are necessarily to consider his interest in the result of this trial,—in the result of this case. He is related to the case more intimately than anybody else, and you are to apply the principle of the law that is laid down everywhere in all civilized countries, commanding you to look at a man's statements in the light of the interest that he has in the case. There is no odor of sanctity thrown around the statements of the defendant as a witness, as is sometimes supposed, because he is charged with crime. You are to view his statements in the light of their consistency, their reasonableness, and their probability, the same as the statements of any other witness, and you are to look at them in the light of the interest he has in the result of the case." The supreme court found the instruction erroneous in the following language: "As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness." We do not find that in either of the cases cited the supreme court has directly held that an instruction contains reversible error which, in general terms, advises the jury that in determining the credibility of the defendant as a witness they are at liberty to take into consideration the fact of his interest in the result of his trial, and in which there is no animadversion upon the testimony which he has given in the case.

It is assigned as error that the court omitted to instruct the jury, in defining the crime of murder, the legal meaning of the words "willfully," "deliberately," "premeditatedly," and "malice aforethought." The court defined murder in the

language of the statute, and gave the statutory definition of malice. Had a proper request been presented to the trial court, containing proper definitions of these words, it would then have become our duty to determine whether this omission would constitute reversible error. The statute defines murder, and states the distinction between murder in the first degree and murder in the second degree. It is not incumbent upon the court to supplement the statutory definition with one of his own, unless, perhaps, the defendant requests it, and proffers an adequate and proper definition. An examination of the entire record discloses no adequate reason for the reversal of the judgment or for a new trial. The judgment is therefore affirmed.

Street, C. J., and Doan, J., concur.

[Civil No. 729. Filed March 28, 1900.]

[60 Pac. 936.]

**THE SVEA INSURANCE COMPANY, Defendant and
Plaintiff in Error, v. ELMER E. McFARLAND et al.,
Plaintiffs and Defendants in Error.**

1. **APPEAL AND ERROR—RECORD—MOTION FOR NEW TRIAL—PRESUMPTION—DENIED BY OPERATION OF STATUTE—WHEN—LAWS OF ARIZ.** 1891, ACT NO. 49, CITED.—Where the record is silent as to any action which the court might have taken on the motion for a new trial, it is proper to assume that it was not expressly ruled upon by the court, but was denied by operation of the statute, *supra*, providing that in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then such motion shall be deemed to have been denied.
2. **SAME—SAME—SAME—TIME FOR FILING—PAR. 836, REV. STATS. ARIZ.** 1887, HELD MANDATORY—**SPICER v. SIMMS**, 6 ARIZ. 347, 57 PAC. 610, CITED.—Where a motion for a new trial is not filed within two days after judgment, the district court is not required to hear and decide it, the statute, *supra*, providing that all motions for new trials shall be made within two days after the rendition of the verdict or judgment being mandatory.

3. ~~SAME—SAME—SAME—SAME—~~SPICER v. SIMMS, 6 ARIZ. 347, 57 PAC. 610, CITED AND DISTINGUISHED.—While the court would not be required to hear and decide a motion for new trial, made more than two days after verdict and judgment, yet it has the power so to do at any time during the term at which judgment was rendered.
4. ~~SAME—SAME—SAME—SAME—~~HOW COMPUTED—SUNDAYS—PAR. 920, REV. STATS. ARIZ. 1887, CONSTRUED.—An intermediate Sunday or holiday is included in computing the two days allowed for making motion for new trial under the statute, *supra*, providing that the time in which any act provided by law is to be done is to be computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded.
5. ~~SAME—SAME—SAME—~~NECESSITY FOR—REVIEW—SCOPE—PUTNAM v. PUTNAM, 3 ARIZ. 182, 24 PAC. 320; RICHARDS v. GREEN, 3 ARIZ. 227, 32 PAC. 266, FOLLOWED.—On appeal no alleged error will be reviewed which might have been good ground for a new trial in the court below, unless the same shall have been presented to such court by a motion for a new trial, and the motion overruled.
6. ~~SAME—SAME—~~ASSIGNMENT OF ERRORS—BRIEF—WAIVER OF ERRORS—PAR. 940, REV. STATS. ARIZ. 1887, AND ACT NO. 71, LAWS OF ARIZ. 1897, CONSTRUED.—Paragraph 940 of the Revised Statutes of Arizona of 1887 required in all cases the appellant shall file with the clerk of the court below an assignment of errors. Act No. 71, Laws of Arizona of 1897, did not do away with the necessity of filing assignments of errors. Section 4 of act No. 71, *supra*, providing that it shall not be necessary to assign or file any assignment of errors in the court below or in the supreme court except those assigned in the brief of the appellant, but that the brief of the appellant shall contain an enumeration of the errors relied upon, and that all errors not assigned in the printed brief shall be deemed to have been waived, does not do away with the necessity of filing assignments of errors, as contemplated by paragraph 940, *supra*, and this court will not consider propositions argued in the briefs in the absence of an assignment of errors.

ERROR from the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

R. M. Ling, and Ross & O'Sullivan, for Plaintiff in Error.

Herndon & Norris, for Defendants in Error.

STREET, C. J.—McFarland & Hooker, as copartners, brought an action in the district court of Yavapai County against the Svea Insurance Company to recover the sum of \$3,500 upon a contract of insurance, and alleged that on the

ninth day of September, 1898, while they were the owners and in possession of a one-story brick building, and the furniture and fixtures and the stock of merchandise therein, situated on a lot in the town of Jerome, Yavapai County, they made their application to the agent of said insurance company for a policy of insurance; that the building was of the value of \$4,600, the stock of merchandise of the value of \$2,008.23, and the fixtures and furniture of the value of \$1,586; that the application was for insurance on the building for two thousand dollars, on the stock for one thousand, and on the furniture and fixtures for five hundred dollars, and that on said ninth day of September, 1898, said agent made an agreement with them to insure the same, said insurance to take effect from 12 o'clock noon of that day, and to be in force for one year thereafter, and that they paid said agent at said time the sum of \$126 premium for such policy of insurance; that afterwards, on the eleventh day of September, 1898, all of said property was totally destroyed by fire. Defendants filed a general denial, and the further answer that the agent mentioned in plaintiffs' complaint was only a soliciting agent, with power to solicit and take applications for insurance, and forward said applications to the defendant for its approval or disapproval, without further powers, and, further, that at the times mentioned in plaintiffs' complaint there was a subsisting mortgage against the property for the sum of three thousand dollars, not within the knowledge of the defendant. The cause was tried to a jury, and verdict rendered for the plaintiff in the sum of \$3,500, upon which judgment was entered on the eighth day of July, 1899. Motion for a new trial was filed on the eleventh day of July, 1899. We are unable to ascertain from the record whether the motion for a new trial was ever heard and passed upon by the court or not. Paragraph 836 of the Revised Statutes of Arizona provides: "All motions for new trials, in arrest of judgment or to set aside a judgment shall be made within two days after the rendition of verdict or judgment, if the term of court shall continue so long; if not, then before the end of the term." Act No. 49 of the Session Laws of 1891 provides: "In case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be deemed to have been denied, and all questions that may have been raised

thereby shall be subject to a review by the supreme court as if said motion had been overruled and exception thereto reserved and entered on the minutes of the court." The record being silent as to any action which the court might have taken on the motion for a new trial, we are permitted to presume it was not expressly ruled upon by the court, but was denied by operation of the statute. The motion for a new trial not having been filed within the two days prescribed by statute, the district court would not be required to hear and decide the motion. The statute requiring a motion for a new trial to be filed within two days is mandatory. Our statute on the subject is borrowed from Texas, and the supreme court of that state, in the case of *Gill v. Rodgers*, 37 Tex. 631, said: "We know of no exception to this requirement of the statute which will allow parties litigant to come in after the expiration of the time limited by law with a simple motion for a new trial." This ruling is not in conflict with the decision made by this court in *Spicer v. Simms*, 6 Ariz. 347, 57 Pac. 610. In that case a motion for new trial was filed after the two days, and the district court granted a new trial. From that order granting a new trial the plaintiff appealed, and this court then said, quoting from the case of *Wells v. Melville*, 25 Tex. 337: "'It does not necessarily follow that a new trial was improperly granted because the motion for a new trial was not made until more than two days after verdict, because facts might have existed that would have made it proper for the court to grant the new trial, although the motion was not made until more than two days after verdict.' And, independent of this construction, it is a rule generally recognized by appellate tribunals that courts possess an unlimited power over their own judgments and orders, in respect to their vacation and modification, until the close of the term at which they are rendered. We conclude, therefore, that the court below had full power to set aside its judgment and award a new trial; that the order so made was not a final judgment; that the action is still pending and undetermined in the lower court; and that this appeal should be dismissed." In that case it was nowhere held that, if a motion for a new trial was filed after the two days, there was a legal obligation upon the court to hear and decide it. It is argued by counsel for plaintiff in error that the judgment being rendered on Saturday, the

8th, and the next day being Sunday, they were allowed Monday and Tuesday in which to file a motion for a new trial; and they cite cases from some states which have a rule that, where a statute requires a thing to be done within a short period of time, if Sunday or a holiday comes within that period it is excluded. No such rule exists in Arizona. It is fixed by statute to the contrary. Paragraph 920 of the Revised Statutes (a part of the same title in which the practice in regard to motion for new trial is prescribed) provides: "The time in which any act provided by law is to be done is to be computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded." If the legislature had intended to exclude an intermediate holiday it would have done so. We therefore cannot consider any of the questions pressed upon us by the plaintiff in error which could not be considered had no motion for a new trial ever been filed. This court, in the case of *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320, laid down the rule, in conformity with many decisions therein cited, that it will not review any alleged error which might have been good ground for a new trial in the court below, unless the same shall have been presented to such court by motion for a new trial, and the motion overruled. It was further said in that case, quoting from a case decided by the supreme court of Texas: "'We will here take occasion to say that, according to what is believed to be the correct rule of practice, no judgment ought to be reversed in this court merely on the ground that the verdict was not supported by the testimony, unless a motion had been made in the court where the verdict was rendered for a new trial and overruled.'" In the case of *Putnam v. Putnam*, *supra*, it was further said: "To hold that this court may consider errors occurring at the trial which were not urged upon motion below as grounds for a new trial, and which therefore could not have been considered by the court below, is inconsistent and illogical." This court again enforced that rule in the case of *Greer v. Richards*, 3 Ariz. 227, 32 Pac. 266 (sub nom. *Richards v. Green*).

Let us now consider the questions properly belonging to the record: In the first place, strictly speaking, plaintiff in error is not entitled to a review of the question discussed,

because of a very defective assignment or errors. Before the passage of act No. 71 of the Session Laws of 1897 the laws of Arizona affecting appeals to the supreme court required (Rev. Stats. par. 940): "The appellant or plaintiff in error shall in all cases file with the clerk of the court below an assignment of errors, distinctly specifying the grounds on which he relies, before he takes the transcript of the record from the clerk's office; and a copy of such assignment of errors shall be attached to, and form a part of, the record." It has been so repeatedly held by this court that an assignment of errors was necessary, before this court would proceed to review any questions argued in a brief, that we will not discuss the necessity again, nor cite authorities in support of the rule. Act No. 71 of the Laws of 1897 did not do away with the necessity of filing assignments of errors. In that particular it provided (sec. 4): "It shall not be necessary to assign or file any assignment of errors in the court below or supreme court, except those assigned in the brief of the plaintiff in error or appellant." The same section also provided: "The briefs of both sides shall begin with a succinct statement of so much of the record as is essential to the questions discussed in them. . . . The brief of the plaintiff in error or appellant shall also next contain a distinct enumeration, in the form of propositions, of the several errors relied on; and all errors not assigned in the printed brief shall be deemed to have been waived." In the case at bar the brief of the plaintiff in error contains no formal assignment of errors, but simply states as follows: "Plaintiff in error asks for a reversal of the judgment of the lower court, and relies on the following propositions." And then states its propositions, five in number. It is the clear intention of act No. 71, above referred to, that, after the brief has been made to contain a succinct statement of what the case is about, it shall then contain the assignment of errors, and, following that, the propositions desired to be discussed, deducible from the assignment of errors. In this case, however, not desiring to deprive the plaintiff in error of its efforts because of informality, we will take up such questions as can be examined into without the aid of a motion for a new trial, and those are only the instructions to the jury. In other words, we will look into the record only. Paragraph 777 of the Revised Stat-

utes provides: "The charge of the court and all instructions asked by either party shall be filed by the clerk, and shall constitute a part of the record; and shall be regarded as excepted to, and subject to revision for error, without the necessity of taking exceptions thereto." The first and second propositions of the plaintiff in error are such as would have to come through a motion for a new trial. The third and fourth propositions relate to instructions of the court to the jury, which, upon careful search, we are not able to find in the record; and counsel have not cited us to where they can be found in the abstract of record, or in the record itself. The fifth proposition, "that the court erred in refusing to give instructions numbered 3, 4, and 6, as asked by the defendant below," has not been argued by the plaintiff in error in any way. No rule has been laid down for our guidance, nor has counsel cited any authorities, or made any effort to demonstrate any reason why instructions numbered 3, 4, and 6, as asked for by the plaintiff in error, were improperly refused. We have examined those instructions ourselves, and upon our own investigation, without the aid of counsel, are not able to discover any reasons why they should have been given, or that the court below committed any error in refusing them. The judgment of the district court is affirmed.

Doan, J., and Davis, J., concur.

[Civil No. 713. Filed March 28, 1900.]

[60 Pac. 881.]

In the Matter of the MINNESOTA AND ARIZONA CONSTRUCTION COMPANY, a Corporation, in Bankruptcy. LINTON et al., Petitioners and Appellants, v. S. R. H. ROBINSON, Respondent and Appellee.

1. BANKRUPTCY—SEC. 4, BANKRUPTCY ACT 1898, CONSTRUED—INVOLUNTARY PETITION—CORPORATIONS—TRADING AND MERCANTILE.—The statute, *supra*, provides that "Any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits . . . may be adjudged an involuntary bankrupt."

Held, that a corporation organized to construct railroads, turn-pikes, canals, dams, reservoirs, etc., and which had constructed a canal and tunnel, and the grade and roadbed of a railroad, and which only temporarily supplied its employees with food, clothes, and other supplies, was not principally engaged in mercantile or trading pursuits, so as to be declared a bankrupt under section 4, *supra*.

2. SAME — SAME — SAME — SAME — PAST TRANSACTIONS—BUSINESS AT TIME OF PROCEEDING CONCLUSIVE.—The statute, *supra*, does not in any case apply to a corporation that has quit all buying and selling of merchandise, has no merchandise on hand, and does not owe any one for merchandise purchased, or in any way connected with its buying or selling of goods. The corporation to be adjudged a bankrupt must at the time of the filing of the petition be engaged in mercantile pursuits.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, and J. K. Doolittle, for Appellants.

That the Minnesota and Arizona Construction Company was principally engaged in trading or mercantile pursuits within the purview of the present Bankruptcy Law, see *In re San Gabriel Sanatorium Co.*, 90 Fed. 271; *In re Odell*, 18 Fed. Cas. No. 10,426; *Groves v. Kulgore*, 72 Me. 489; *Graham v. Hendricks*, 22 La. Ann. 524; *Winter v. Iowa R. R. Co.*, 30 Fed. Cas. No. 17,890; *Wendel v. State*, 62 Wis. 300, 22 N. W. 435; *Heyneman v. Blake*, 19 Cal. 579; *In re Pinkney*, 47 Kan. 89, 27 Pac. 179.

Baker & Bennett, for Respondent.

The Minnesota and Arizona Construction Company is neither a trader nor a merchant. *In re Duff*, 4 Fed. 519; *In re Merritt*, 7 Fed. 853; *In re Smith*, 2 Lowell, 69, Fed. Cas. No. 12,981.

DOAN, J.—On the sixth day of February, 1899, S. R. H. Robinson filed his complaint in the territorial district court of Maricopa County against the Minnesota and Arizona Construction Company, a corporation, to recover \$20,500 for

services rendered the corporation as general manager and superintendent of the construction work then being prosecuted by it, and on second cause of action \$510 on an assigned claim of James A. Fleming against the defendant for office rent. On March 21st the defendant answered, and admitted the services rendered by the plaintiff, but denied any indebtedness thereon in excess of \$3,541, and alleged that at the time of the organization of the defendant company the plaintiff received seven hundred and fourteen shares of the capital stock of the defendant corporation,—an equal amount with his co-organizers; and that it was the agreement and understanding that plaintiff should receive his compensation for services rendered by way of dividends on stock. Ancillary to his action, plaintiff sued out a writ of attachment, which was levied on personal property of the defendant. The defendant corporation was organized under the laws of the territory of Arizona by articles executed on the thirtieth day of March, 1895, by Donald Grant, R. B. Langdon, A. H. Linton, D. W. Grant, C. S. Langdon, S. R. H. Robinson, and Samuel Grant, who, by the articles, became the board of directors, with Donald Grant president, A. H. Linton vice-president, C. S. Langdon secretary and treasurer. The capital stock was divided into five thousand shares of the par value of one hundred dollars. Said organizers and directors subscribed for the same in equal amounts. On the eighteenth day of March, 1899, A. H. Linton brought an action in the district court against the defendant corporation to recover the sum of \$21,006.86. On the twenty-second day of March, 1899, A. H. Linton filed a petition in bankruptcy on the federal side of the court against the defendant corporation, as a creditor thereof, alleging that at various times between the twenty-fifth day of March, 1895, and the 15th of March, 1899, he had loaned the said corporation money aggregating the sum of \$31,006.86; that the corporation was insolvent, and that within four months next preceding the date of his petition the said corporation committed an act of bankruptcy, in that they had permitted one S. R. H. Robinson to institute a suit against them to obtain a writ of attachment, which was levied on the property of the defendant company, of the value of more than eight thousand dollars, and moneys in bank of more than seven hundred dollars, and that neither

was the attachment vacated nor suit dismissed. He further alleged that on the eighteenth day of March he had commenced an action against the defendant corporation to recover the sum of \$31,006.86, and that thereupon the said corporation, by resolution of its board of directors, admitted the justice of the claim, and admitted in writing the inability of the corporation to pay its debts, and its willingness to be adjudged a bankrupt. The schedule attached to said petition shows the debts to be the petitioner's claim in the amount aforesaid, to secure which the corporation had transferred to him a promissory note of the Rio Verde Canal Company, dated March 15, 1899, in the sum of \$120,273.64, valued at one dollar; claim in favor of R. B. Langdon, deceased, \$2,547.50, for moneys loaned and advanced; claim in favor of Donald Grant in the sum of \$32,169.10, for moneys loaned and advanced; claim in favor of Cavour S. Langdon in the sum of \$16,279.92, for moneys loaned and advanced; claim in favor of D. W. Grant in the sum of \$16,084.55, for moneys loaned and advanced; claim in favor of James A. Fleming \$495, for rent of office rooms. Robinson intervened, and contested the petition, and alleged that it was not a corporation, either organized for the purpose of or engaged in any trade or mercantile business, but was a corporation organized for and engaged in the work of construction only. The articles of incorporation of the defendant corporation provide as follows: "Know all men by these presents, that we, the undersigned incorporators, desiring to form a corporation under the Revised Statutes of the territory of Arizona relating thereto of March 8th, 1887, and all acts amendatory thereof, do hereby associate ourselves for that purpose, and have signed, adopted, and acknowledged the following articles of incorporation, to wit: Article 1. The names of the persons so associating themselves for the purpose of forming said corporation are Donald Grant, R. B. Langdon, A. H. Linton, D. W. Grant, C. S. Langdon, S. R. H. Robinson, and Samuel Grant. Art. 2. The name of this corporation shall be the Minnesota and Arizona Construction Company. Art. 3. The principal place for transacting the business of said corporation within the territory of Arizona shall be the city of Phoenix, but said corporation expressly reserves the right to itself to carry on a part of its business in the city of Minne-

apolis, in the county of Hennepin, state of Minnesota, and at such other places within such other territories and states of the United States, or foreign countries, as may hereafter be deemed expedient for the best interest of said corporation.

Art. 4. The general nature of the business proposed to be transacted by said corporation is as follows: To make and enter into contracts for the construction and equipment of railroads, railroad bridges, toll roads, and toll bridges, canals for navigation, water power, irrigation, or other purposes, public, private, municipal, or domestic, either in the territory of Arizona, or in such other states and territories, or foreign countries, as said company may from time to time deem expedient, and for that purpose to undertake the construction and erection of railroads, turnpikes, railroad bridges, toll bridges, canals, dams, flumes, reservoirs, tanks, ditches, aqueducts, sewers, hydrants, or other hydraulic or electric appliances necessary for carrying on and transacting said business. Said company shall also be authorized and empowered to undertake the construction, erection, and equipment of telegraph and telephone lines, and the generating, creating, accumulating, storing, distributing, using, and selling electricity for any and all purposes to which the same is or may be applied, and the buying, constructing, owning, using, leasing, operating, and selling any and all motors, machinery, mechanical appliances, or devices by means of which electricity may be generated, stored, transmitted, applied, or used for any lawful purpose, and to use and operate the same; and for that purpose and to that end shall be empowered to buy, lease, rent, or otherwise acquire, appropriate, enjoy, and use lands, tenements, and hereditaments, water and water rights, and rights to use of water for water power, mining, manufacturing, irrigating or any other lawful purpose. And said company shall be fully authorized and empowered to sell, lease, rent, or otherwise dispose of any of said lands, tenements, hereditaments, or appurtenances, water, water rights, or rights to the use of water for water power, mining, manufacturing, irrigating, or other purposes, and to improve the same by erecting and constructing thereon such railroads, bridges, toll roads, toll bridges, canals, dams, flumes, reservoirs, ditches, aqueducts, sewers, or any other erections, constructions, or buildings necessary or expedient to enhance the

value thereof, or to improve the same; and in like manner, and to the same extent, said corporation shall be empowered to sell, convey, lease, let, mortgage, or otherwise dispose of, charge or encumber such lands, tenements, and hereditaments, real and personal property and estate, or any of the same, or any right or interest therein, at pleasure, and in such manner and on such terms as such corporation or association may determine by order of its directors, or establish by its by-laws, and for that purpose to make and deliver, and in like manner accept and receive, all necessary and proper deeds, conveyances, mortgages, leases, and other contracts in writing obligatory, and to have and exercise all the necessary rights, franchises, muniments, states, powers, and privileges necessary to that end. And such association or corporation is authorized to loan money and funds to secure such loans by mortgage or other security, and to do and perform any and all things incidental to or expedient for the best interest of said corporation, and in carrying on and transacting the business for which it is incorporated. Art. 5. The amount of capital stock authorized is the sum of \$500,000, and the same shall be divided into 5,000 shares of \$100.00 each, which shall be paid in at the times and on conditions as follows: The capital stock of the corporation shall be issued for cash or for work and materials performed or furnished, or other property, franchises, or contracts conveyed or assigned to said corporation, and the same shall be issued as fully paid up and non-assessable. Art. 6. The time of the commencement of said corporation shall be the first day of April, one thousand eight hundred and ninety-five, and the same shall continue in existence, unless dissolved, or the time further extended, for the period of twenty-five years from that date. Art. 7. The officers of said corporation to conduct its affairs shall consist of a board of directors of not less than five or more than nine directors; the number of directors to be fixed and determined by the by-laws to be adopted at the first annual meeting of said corporation, until which time the incorporators shall constitute the first board of directors. The members of the first board of directors are as follows: Donald Grant, R. B. Langdon, A. H. Linton, D. W. Grant, C. S. Langdon, S. R. H. Robinson, and Samuel Grant. The annual meeting of stockholders shall be held on the second Tuesday

of March of each year, or some other date to which said meeting may be adjourned. Art. 8. The officers of said corporation shall be: President, vice-president, secretary and treasurer, and such officers as the by-laws of the corporation shall provide; and all of the officers above stated shall be members of the board of directors, but the directors shall be fully authorized and empowered to elect or appoint such other officers or agents or employees from time to time as the business of the corporation may render necessary. Until the annual meeting of the stockholders in the year 1896, and until their successors shall be duly elected and qualified, the following named persons shall be the officers of this corporation, to wit: Donald Grant, president; A. H. Linton, vice-president; C. S. Langdon, secretary and treasurer. Art. 9. The highest amount of indebtedness or liability to which said corporation shall at any time be subject shall be the sum of fifty thousand dollars. Art. 10. The private property of each officer and stockholder of said corporation shall be exempt from all corporate debts. In witness whereof, we have hereunto set our hands and seals this 30th day of March, A. D. 1895."

At the trial of the issue as to whether the company should be adjudged bankrupt it was shown that the articles of incorporation were filed with the secretary of the territory on the ninth day of May, 1895, and at a meeting of the corporation held at Minneapolis, Minn., on May 28, 1895, a resolution was passed reciting that Messrs. Langdon, Linton & Co. and Messrs. D. Grant & Co. were the owners of a certain contract with the Rio Verde Canal Company for the construction of a canal in Arizona, and resolved: "That this company purchase of said Langdon, Linton & Co. and D. Grant & Co. the said contracts above set out, and that upon the execution and delivery to this company of the proper assignments thereof the president and secretary be authorized and directed to execute and deliver to said Langdon, Linton & Co. and said D. Grant & Co. 5,000 shares of the full-paid stock of this company, or to such parties, firms, or corporations as they may direct." It was also shown that the organizers of the company and the directors in the company were all of them, except S. R. H. Robinson, members of either the firm of Langdon, Linton & Co. or D. Grant & Co.; and it was also shown

that Langdon, Linton & Co. and D. Grant & Co. and S. R. H. Robinson were contractors, engaged in the business of constructing railroads and canals. All the debts owed by the corporation were owed to its directors, except the office rent to Fleming, and the claim of Robinson as superintendent, and that claim arose and suit was brought on it while Robinson was a director; and it was shown upon the part of the intervener that Langdon, Linton & Co. and D. Grant & Co., as contractors having in charge the building of an immense canal in Arizona for the Rio Verde Canal Company, and the said Robinson also being a contractor, and desiring to aid in the building of said canal, it was agreed that they would form a corporation, and pursue the work of building the canal through its instrumentality. It was also shown that the Rio Verde Canal Company had no money on hand with which to pay for the construction of the canal, but that they were the owners of large water locations, franchises, and rights of way, and they expected to raise the money by bonds; that Langdon, Linton & Co. and D. Grant & Co. were to furnish the money for the building of a large portion of the canal, pending the negotiations of the Rio Verde Canal Company for the sale of their bonds; that when the construction company was organized no money was paid in on the capital stock, but that it was the arrangement with the members of the old firm of Langdon, Linton & Co. and the members of the old firm of D. Grant & Co., all being directors in the construction company, to advance money to the construction company, the same as they would have done as individuals in their respective partnerships of Langdon, Linton & Co. and D. Grant & Co.; the moneys so advanced by each to go upon the payment of their subscription to the capital stock. It was also in evidence that Robinson should turn in the teams and construction outfit which he then had, and his salary as manager in the field, in payment of his subscription to the capital stock, which he did to the amount of about six thousand dollars. These facts tended to prove that the corporation was not in debt to Linton or to the other members of the corporation. It appears that the petitioners had no contract relations with the corporation whereby debts owed them were created, but that they advanced money to the corporation to enable it to carry on the business of constructing

the Rio Verde Canal. There are no debts owing by the corporation, except to Fleming for office rent, outside of the claims of the directors of the corporation for moneys advanced to it, and of Robinson for salary as manager while a director; and it is urged as a grave consideration upon the court that under those circumstances one director should not be allowed by his petition to force the corporation into involuntary bankruptcy, and that his co-directors, having claims of a like character, should not be allowed to place the corporation in an attitude to be forced into bankruptcy, by signing a writing consenting to the same being done.

If the claims of the directors are not debts against the corporation, but advances made by them upon their subscription to stock, it could scarcely be said that the Minnesota and Arizona Construction Company is insolvent. It is the owner of personal property and money in the amount to pay the admitted indebtedness of the company to Robinson. Section 4 of the Bankruptcy Act does not provide for bankruptcy of corporations under voluntary petitions, and for only such corporations on involuntary petitions as are "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits." The first question is whether, under the evidence, the defendant is such a corporation. This, if determined in the negative, will render unnecessary the consideration of the other issues presented. There was some evidence upon the part of petitioners that the company had engaged in mercantile pursuits, but this is fully met by the testimony of the intervener that they never were in the mercantile business. The first work undertaken by them was the construction of the Rio Verde Canal in Arizona, at a point far removed from the base of supplies. They furnished their men with provisions, shoes, overalls, tobacco, and such necessary articles as men have to have while at work, from E. F. Kellner's store, and paid to Kellner the price thereof, and took the amount out of their men's wages. After it ceased labor on the canal, and in order to employ its teams while waiting for a probable resumption of work thereon, it took a contract to freight from Geronimo, the terminal of a railroad, to the city of Globe. At Geronimo it did no merchandising, but dealt for itself and men at the supply store of the company from which it took its subcontract. Afterwards it

took the contract of building a railroad in Yavapai County, and at that place it kept only a supply stock for the benefit of its employees. Under such circumstances it could not be said to be a corporation principally engaged in mercantile pursuits.

The next question is whether it is a corporation principally engaged in trading. The usual meaning of trader is "one who buys and sells goods"; "one who makes it his business to buy merchandise, goods, and chattels, and sells the same for the purpose of making a profit." The firm of Langdon, Linton & Co., as contractors, could not be called traders, nor could D. Grant & Co., or S. R. H. Robinson. When they combined, and undertook to transact their business through the medium of a corporation of which they themselves were directors, we do not find that they changed the character of the business engaged in. It possibly may be said that their articles of incorporation would have allowed them to have changed their business, or extended it into trading, but we have seen them in fact engaged in no business but the business of construction. Counsel on both sides have cited many authorities from which they reason either that the construction company was engaged in trading or that it was not. It has been decided that a baker buying flour and supplying his customers was a trader; that "merchant" includes "hotel-keeper"; that a butcher buying beef on foot and selling it was a trader, but that a butcher killing his own stock and selling it was not a trader; that a teamster who to a very considerable extent buys and sells hay and straw to support his teams while idle is not a trader; that railroad and transportation companies are not traders; that a theatrical manager, though he buy and sell costumes, is not a trader. The consensus of opinions gathered from the reports seems to be that, to constitute a trader, the operation of buying and selling for profit must enter into the occupation. The only case that seems to be in point is *In re Smith*, reported in 2 Lowell, 69, 22 Fed. Cas. 394 (No. 12,981), a decision under the old Bankruptcy Law of 1867, which seems to be quite analogous to, if not identical with, the case at bar; and it was there decided that one who contracts with a railroad company to grade and build its road is not a trader. If an individual contractor who contracts to dig a canal or to build a railroad

is not a trader under the definition of trader and under the decision last cited, a corporation which does the same act cannot be a trader. The case *In re San Gabriel Sanatorium Co.*, (D. C.) 95 Fed. 271, cited by the appellant, is to the same effect. This company was adjudged a bankrupt, but it was in accordance with the generally accepted doctrine that a hotel-keeper is a merchant. The court says: "Respondent's institution is not a charity, but is conducted for profit. Patients are lodged and furnished with the usual accommodations of a hotel at the sanatorium, the rates charged being \$25 per week and upwards. . . . If an incorporated company, such as a private hospital, be conducted in a business way for profit, and not on charitable lines, it is a trading or mercantile corporation, within the meaning of the present bankrupt law." But the court, in the opinion, uses this argument, that seems peculiarly applicable to the case at bar. After quoting from section 4 of the Bankrupt Act, "Any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits . . . may be adjudged an involuntary bankrupt," the court says: "While the artificial atmosphere used at respondent's sanatorium is doubtless the product of a manufacturing process, I am not prepared to hold that manufacturing is respondent's principal business." The court regarded the word "principally" as being employed to distinguish a calling or usual occupation from an isolated single transaction, or from something simply an incident to one's principal business or usual occupation. Thus the manufacture of artificial atmosphere by the respondent, while not an isolated single transaction, was yet of such minor importance, when compared with the volume of the entire business of the company, that the court held that it was not respondent's principal business. The general nature of the business proposed to be transacted by the defendant corporation in the case at bar as provided by its articles of incorporation is the construction of railroads, turnpikes, canals, dams, reservoirs, etc. A careful inspection of the articles of incorporation shows that the only authority to engage in merchandising conferred by the charter is given in the following language: "And such corporation is authorized to do and perform any and all things incidental to or expedient for the best interest of said corporation in carrying

on and transacting the business for which it is incorporated." The entire business it had in fact transacted since its incorporation, as shown by the record, was construction of canal and tunnel, \$105,000; freighting some months from Geronimo to Globe; construction of grade and roadbed of railroad, \$110,000; and the purchase and furnishing of merchandise and supplies for its force while thus engaged; and the sale of about \$253.28 worth of feed and supplies to sundry persons while completing the \$110,000 railroad contract. It had, at the time when suit was instituted, some stock for the conduct of its principal or usual business, and some indebtedness that had been incurred in the prosecution of that business; but it did not have, nor had it for months past had, either any goods for mercantile or trading pursuits, or any indebtedness that had been incurred in such pursuits. What little business it had ever done in that line as incidental to its principal business had been closed out, and all debts arising therefrom had been paid. The statute contemplates a present condition, not something which has been finally completed, entirely closed up, and of which nothing remains, either of stock on hand or debts owing. The corporation, to be adjudged a bankrupt, must, at the time of the filing of the petition, be engaged in mercantile pursuits. The statute does not in any case apply to a corporation that has quit all buying and selling of merchandise, has no merchandise on hand, and does not owe a dollar to any one for merchandise purchased, or in any way connected with its buying or selling of goods. If ever within the purview of the act, the defendant corporation certainly was not at the time the petition was filed. *Kinsey v. Little River Co.*, 4 Cent. Law J. 247, 14 Fed. Cas. 639 (No. 7,829). The court correctly held that the defendant corporation was not principally engaged in trading or mercantile pursuits, and was, therefore, not such a corporation as could be adjudged a bankrupt. This renders unnecessary the consideration of the other questions raised, further than to say that the dismissal of the petitions properly followed. The judgment of the lower court is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 719. Filed March 28, 1900.]

[60 Pac. 888.]

FRANK M. MAIN, Plaintiff and Appellant, v. MRS. FRANCIS MAIN et al., Defendants and Appellees.

- 1. APPEAL AND ERROR—ASSIGNMENT OF ERROR—MUST BE SPECIFIC—**
RULE 6, SUBD. 2, OF SUPREME COURT RULES CITED—MILLER v. DOUGLAS, ANTE, P. 41, 60 PAC. 722, FOLLOWED.—An assignment of error that the court erred in overruling a motion for a new trial is too general to be considered on appeal, subdivision 2 of supreme court rule 6 providing that "If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered as distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors."
- 2. SAME—SAME—SAME—MUST STATE FACT RELIED ON TO SHOW ERROR.**
—Assignments of error are of the nature of allegations in a complaint, and take the place in an appellate court of a complaint in a *visi prius* court. Each assignment of error must state some fact relied upon, and an assignment that the court erred in finding the issues for the defendants is too general.
- 3. APPEAL AND ERROR—JUDGMENT—GENERAL FINDING OF ISSUES WILL SUPPORT—WHEN—DAGGS v. HOSKINS, 5 ARIZ. 300, 52 PAC. 357, FOLLOWED.**—A general finding of the issues in favor of the defendants sufficiently supports a judgment, the decree being based upon defensive matter, and not affirmative matter pleaded in a cross-complaint.
- 4. HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND TO WIFE—SEPARATE PROPERTY—PAR. 2102, REV. STATS. ARIZ. 1887, CONSTRUED.**—Under the statute, *supra*, making property acquired during coverture the common property of the husband and wife, and empowering the husband only to dispose of it during the coverture, a conveyance of community property from the husband to the wife changes its character from community to the separate property of the wife.
- 5. FINDING OF FACT—SUPPORTED BY EVIDENCE—WILL NOT BE DISTURBED.**
—There being evidence to support a finding of fact, it will not be disturbed by an appellate court.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Santa Cruz. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, and C. W. Wright, for Appellant.

If at the time the husband delivered the deed to his wife it was the intention to make her a present of his interest in the property, then it thereby became her sole property. But, on the contrary, if it was his intention when he made the conveyance to save her the expense and trouble of administering on his estate, he then contemplating a hazardous journey into a foreign country where his life was believed by him to be imperiled, and his intent not then being to have the property lost to the community, then the conveyance did not make the property the separate property of the wife. And so, too, if he was threatened with a blackmailing suit, and to protect his property from this suit and its possible evil consequences, he made the conveyance, not intending at the time to change the character of the property from community into separate property, then the property was not lost to the community.

In a word, it is the intention of the grantor at the time the deed is made that will control its effect. *Peck v. Vandenberg*, 30 Cal. 21; *Higgins v. Higgins*, 46 Cal. 264; *Wedel v. Herman*, 59 Cal. 516; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Higgins v. Johnson*, 20 Tex. 393, 70 Am. Dec. 394; *Story v. Marshall*, 24 Tex. 306, 76 Am. Dec. 106; *Wright v. Wright*, (Cal.) 41 Pac. 695.

S. M. Franklin, for Appellees.

“When the husband conveys property to his wife, whether it be his separate property or community property, the conveyance operates to vest the title in the wife as her separate estate.” *Wright v. Wright*, (Cal.) 41 Pac. 695; *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. 715; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Oakes v. Oakes*, 94 Cal. 66, 29 Pac. 330.

The *prima facie* presumption arising from a deed of a husband to a wife conveying to her community property is that it was intended to change its character from community to separate property of the wife. *Story v. Marshall*, 24 Tex. 306, 76 Am. Dec. 106; Platt on Property Rights of Married Women, sec. 34; *Taylor v. Opperman*, 79 Cal. 471, 21 Pac. 869.

“Where property purchased with community funds was

conveyed to the wife by direction of the husband, and with the intent that it should become her separate estate, the conveyance operates as a gift from him to her. *Wright v. Wright*, (Cal.) 41 Pac. 695; *Peck v. Brummagin*, 31 Cal. 358; *Woods v. Whitney*, 42 Cal. 358; *Higgins v. Higgins*, 46 Cal. 259; *Read v. Rahm*, 65 Cal. 343, 4 Pac. 111. If a wife obtains a deed from her husband conveying to her all his or the community property, such deed being executed in consideration of a parol promise to reconvey, a violation on her part of the parol promise is constructive fraud, and she will be held to her agreement; but the evidence of such agreement must be clear, satisfactory, and conclusive. *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Hunter v. Hunter*, (Tex. Civ. App.) 45 S. W. 820.

STREET, C. J.—On May 31, 1899, the appellant, Frank M. Main, brought action in the district court of the first judicial district, county of Santa Cruz, against the appellees, to have certain property described in his complaint decreed to be community property, and to have a certain deed executed by appellee Francis Main to appellee Mary Marsh annulled. At the time of the commencement of the action appellant, Frank M. Main, and appellee Francis Main were husband and wife, and had been ever since the year 1867. Appellee Mary Marsh was the daughter, issue of said marriage, and George B. Marsh was her husband. The property described in the complaint was lot 1, block 10, lots 10 and 11, block 6, lots 1, 2, and 3, block 7, and an undivided one-half interest in lot 11, block 2; all in the town of Nogales, county of Santa Cruz. The title to said property stood in the name of the plaintiff, Frank M. Main, except lot 10, block 6, and lot 2, block 7, which last-named lots were in the name of the wife, and had never been in the name of the husband, conveyances having been made direct to her from former owners. On the twentieth day of February, 1894, the husband, by deed of conveyance reciting a consideration of five dollars in money “and for love and affection that he bears unto the said party of the second part,” conveyed unto his wife, Francis Main, an undivided one-half interest in lot 11, block 2, and lot numbered 1 in block 10, lot 11 in block 6, and lots 3 and 4 in block 7. On the 6th of March, 1899, the wife, Francis Main, “in

consideration of the sum of five dollars and of the love and affection that she bears unto the said party of the second part," conveyed the said undivided one-half interest in lot 11, block 2, to the daughter, Mary Marsh. The plaintiff alleged that at the time of conveying said lots to his wife he was threatened with blackmailing suits, and that he was about to start on a tour through Mexico, and that by reason of said premises he was advised to convey the community property to his wife, for the purpose and with the intent of preventing the bringing of said blackmailing suits, and with the further purpose and intent that, in the event of the death of plaintiff, the title to the property might be in the wife free from complications, expense, and annoyance; that at the time of said conveyance it was well understood and agreed between him and his wife that in the event of his return his wife would, on request, reconvey the property to plaintiff; and that said property, and all of it, should continue to be community property, notwithstanding the conveyance; and that the delivery of the deed was made with that understanding and agreement. The wife made answer that the property was not, and had not been since the date of the conveyance and the delivery of the deed, the community property, but that it was her separate property; and denies that there was such an agreement for reconveyance; and alleged that all of said property was her sole and separate property, and that the said deed of conveyance was a gift from her husband. The cause was tried to the court without a jury, and the court found all the issues against the plaintiff and in favor of the defendants; and, as a conclusion of law, that the plaintiff was not entitled to receive and recover anything in the action; that all the property was the sole and separate property of the defendant Francis Main, except the undivided one-half interest in lot 11, block 2, and that the same was the sole and separate property of the defendant Mary Marsh. Appellant makes the following assignment of errors: "(1) The court erred in overruling the motion for a new trial. (2) The court erred in finding the issues for the defendants. (3) The court erred in this case in making a general finding of all the issues for the defendants, and in not finding especially the facts necessary to a judgment. (4) The court erred in finding that the evidence sustains the judgment. (5) The findings do

not sustain the judgment. (6) Because the court should have found the issues for plaintiff, and rendered judgment accordingly, and for not doing so the court erred. (7) The court erred in holding the property involved in the suit to be the separate property of the wife, whereas the evidence shows that it was conveyed by the husband to the wife, with no intent of making it separate property, or of losing his interest therein."

As to the first assignment of error,—to wit, that the court erred in overruling the motion for a new trial,—the abstract of the record does not show that any motion for a new trial was ever made, as it should do if appellant expects this court to look into that question. Turning to the files of the district court, which are lodged with the clerk of this court, we find a motion for a new trial was made upon general allegations of error. As we said in the case of *Miller v. Douglas* (decided at this term), *ante*, p. 41, 60 Pac. 722: "Our rules of court (rule 6, 4 Ariz. xi, 35 Pac. vii) provide that 'all assignment of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of.' Subdivision 2 of that rule provides: 'If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered as distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors.' Counsel relies on the statute in relation to motions for new trial, approved March 22, 1893 (act No. 21, Laws 1893), and says that, if the motion for a new trial is not required to be specific, an assignment of error which specifies the general grounds of the motion in conformity with the statute is sufficient. Even without the aid of our rules, we feel appellant's contention is untenable; but, inasmuch as the rule was adopted by the court after the act referred to was passed, the rule operates upon the statute in such a way as to make it necessary in the assignment of errors that 'the court erred in overruling a motion for a new trial' to specify in what particular the court erred; all of which can be readily done without stating the argument necessary to be employed to sustain the assignment."

As to the second, fourth, fifth, and sixth assignments of error, under the well-established rule of this court, and un-

der the former decisions, they are too general to receive investigation. Assignments of error are of the nature of allegations in a complaint, and take the place in an appellate court of a complaint in a *nisi prius* court. Each assignment of error must state some fact relied upon, and to make an assignment in the simple language that the court erred in finding the issues for the defendants would no more suffice as an allegation than would the simple allegation in a district court complaint that the defendant was indebted to the plaintiff on a promissory note.

The third assignment of error, to wit, that the court erred in this case in making a general finding on all the issues for the defendants, and not finding especially the facts necessary to a judgment, meets its answer in the former decisions of this court. In *Daggs v. Hoskins*, 5 Ariz. 300, 52 Pac. 357, 358, in discussing the question of the necessity of specific findings of fact, we said: "A general finding for the plaintiff will not support a judgment in his favor. A different rule, however, is applied where there is a general finding for the defendant in an action, and a judgment dismissing the complaint. Our statute does not require that the findings of fact shall be special, but only requires that in the decisions of the court findings of fact shall be separately stated from the conclusions of law. We hold that a general finding of the issues in favor of the defendants sufficiently supports the judgment." Again, in *McGowan v. Sullivan*, 5 Ariz. 334, 52 Pac. 986, we said: "It is urged as ground for reversal that the lower court failed to state its findings of fact and conclusions of law. The transcript shows a general finding upon the issues in favor of the defendant; and we have already held, in the case of *Daggs v. Hoskins*, *supra*, that a judgment upon such finding is valid under the act of the legislature approved March 16, 1897." In this case, although the trial court decreed that the property was the separate property of the defendants, yet the decree was based upon defensive matter of the defendants, and not upon affirmative matter in a cross-complaint. The title to the property was already in the name of the defendants, where it would have to remain, under the operation of law, until removed therefrom by a decree taking the title from the defendants, and placing it in the plaintiff. No decree that it remain there was necessary.

The seventh assignment of error is possibly sufficient in the allegation that the court erred "in holding the property involved in the suit to be the separate property of the wife," etc. Whether it is intended by counsel that the court erred in holding it as a matter of law or whether the error was made in holding it as a matter of fact cannot be discovered from the abstract of the record. It is the only assignment, however, that is discussed in counsel's brief, and they there discuss it as a question of law and as a question of fact. Paragraph 2102 of the Revised Statutes of Arizona provides as follows: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife and her minor children, while she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only." The question, then, arises whether the presumption exists after the property is conveyed by one spouse to the other, and especially after the property is conveyed by the husband to the wife. In the case of *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869, this same question is discussed. In that case the property was conveyed to the husband and the wife, and afterwards the husband executed a deed of the property to the wife, "to have and to hold to her sole use all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns, forever." The court, in its opinion in that case, refers to the case of *Story v. Marshall*, reported in 24 Tex. 305, 76 Am. Dec. 106, as follows: "A very similar case to this was once before the supreme court of Texas, where the law in relation to the property rights of husband and wife is almost the same as ours. In that case two lots of land were conveyed to John Farrell and his wife, and were community property. Subsequently, Farrell executed a deed of the lots to his wife. The deed expressed a consideration of one hundred dollars, but no consideration was in fact paid. Afterwards the wife died, leaving one child, who was the plaintiff in the action; and after the wife's death the husband sold and deeded the lots to the defendant in the action. The action was brought to determine the plaintiff's title and recover the lots. The court said: 'It is not questioned that,

under our law, the husband may make a gift or grant of property to his wife by conveyance to her directly, without the intervention of trustees. It has been so held in repeated decisions. . . . In the absence of any evidence of intention outside of the deed, it must be taken as evidencing the intention which, upon its face, it imports; that is, to convey to the wife the estate of the husband in the property. It must have been intended to have some operation upon the estate of the grantor, and that must be taken to have been to change the estate from community into separate property of the wife, in the absence of evidence of any other or different purpose in the making of the conveyance. To deny it that effect would be to render the deed wholly inoperative and void. The grantor could have made an effectual conveyance to a stranger of the whole estate; and it is not perceived that there is any legal impediment to his conveying to his wife his interest, thereby investing her with the whole estate. . . . There can be, in this case, no presumption, as in the case of a purchase from a stranger in the name of the wife, that funds of the community were employed in making the purchase; and therefore it is community property. But the conveyance being of community property of the parties between whom the conveyance is made, *prima facie* the presumption must be that it was intended to change its character from community to the separate property of the wife. The subsequent sale of the property by the husband cannot be deemed sufficient to rebut this presumption.''' The California case followed the Texas case, and said that they thought the same rule should be applied in California, holding that *prima facie* it was the presumption that the deed from the husband to the wife was intended to change the character of the title from community to separate property of the wife. Our statute containing the same provisions as the statutes of California and of Texas, that property acquired after marriage should be deemed community property, and should be disposed of by the husband only, gives those two cases authority for our courts in holding that the character of the title is changed from community to separate property by the deed from the husband to the wife. If the district court so held as a question of law, it did not err. In the case of *Brison v. Brison*, referred to by appellant (90 Cal. 323-334, 27 Pac. 186), the husband sought to recover property conveyed by him to his

wife, when he was about leaving home, under the promise from her, as he alleged, that she would deed it back to him upon his return, if he so requested. She denied the allegation, and claimed the property as her separate property, a gift from her husband. The court there said: "It may be conceded, as is claimed by appellant, that the evidence of a verbal agreement between husband and wife that will create a constructive trust should be clear, satisfactory, and conclusive; but it must also be conceded that whether the evidence in any case is of this character must be determined by the trial court, and that this court must accept the determination of the trial court thereon as conclusive." In that case the trial court determined the fact in favor of the husband, and the supreme court would not disturb it. In this case the trial court determined the fact in favor of the wife, under the allegation and the evidence of the husband that it was agreed between him and her that the property should be deemed the community property, and that the wife should retransfer it to him upon his return, if he so requested. If the district court held that the property was the separate property of the wife, there is abundant evidence to support such finding, and the supreme court will not disturb it. Judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 725. Filed November 9, 1900.]

[62 Pac. 691.]

LEWIS WOLFLEY, Plaintiff and Plaintiff in Error, v. W. T. BROWN et al., Defendants and Defendants in Error.

1. **TRESPASS — EVIDENCE — PARTNERSHIP — NOT LIABLE FOR ACTS OF INDIVIDUAL MEMBERS NOT DONE FOR ITS BENEFIT OR IN ITS BEHALF.** —Where a member of defendant partnership purchased at sheriff's sale a quartz-mill under a judgment foreclosing a lien which defendant partnership had thereon, and thereafter took such mill from the possession of plaintiff, an action of trespass cannot be maintained as against the partnership in absence of proof to show that any part of the mill came into possession of the firm, or that the transaction was intended for its benefit.

ERROR from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

J. B. Woodward, and Joseph H. Kibbey, for Plaintiff in Error.

L. H. Chalmers, and H. B. Wilkinson, for Defendants in Error.

DAVIS, J.—On the twenty-third day of September, 1898, Lewis Wolfley brought an action in the district court of Maricopa County against W. T. and C. D. Brown, copartners doing business under the firm name and style of Brown Brothers, to recover damages against the said defendants for an alleged trespass charged to have been committed by them in wrongfully and forcibly entering upon the premises of the plaintiff, and removing therefrom certain mining machinery and apparatus constituting a quartz-mill plant. The cause was tried before the lower court, sitting without a jury, and a judgment was rendered in the defendants' favor. The plaintiff filed his motion for a new trial, which was overruled, and the cause is presented to us for review.

These facts appear from the record: That on or about October 20, 1894, a corporation known as the Yarbo Mining Company was organized under the laws of the territory of Arizona, and the plaintiff, Lewis Wolfley, became its general manager. In November and December following he erected a quartz-mill for said company upon its mining claims in Yarbo Gulch, Yavapai County, towards the construction and repair of which the defendant firm, Brown Brothers, supplied articles of machinery and other material, for which they afterwards perfected a statutory lien. On September 20, 1895, said firm commenced a suit in the district court of Yavapai County against the Yarbo Mining Company to enforce said lien. The case was tried on September 13, 1897, and resulted in Brown Brothers recovering a judgment for their claim, and an order for the sale of the milling plant. Thereafter the said quartz-mill was advertised by the sheriff of Yavapai County to be sold as chattel property on the

seventh day of March, 1898, and on that day the same was offered, struck off, and declared sold to W. T. Brown, who was the highest bidder therefor. The sheriff's official return recites "that on the 7th day of March, 1898, the day on which said property was advertised to be sold, as aforesaid, I attended at the time and place so fixed for said sale, and exposed the said property for sale at public auction, according to law, . . . when W. T. Brown, being the highest bidder therefor, the said property was struck off by me to the said W. T. Brown, . . . and I delivered to said purchaser a bill of sale." During the pendency of Brown Brothers' suit against the Yarbo Mining Company the said Lewis Wolfley, claiming an individual ownership of the property, but with actual knowledge of the aforesaid firm's lien thereon, removed the said quartz-mill from the mining claims of the Yarbo Mining Company in Yavapai County to a point in Maricopa County, where it was in fact located at the time of the sheriff's sale proceedings in Yavapai County. On the sixteenth day of April, 1898, W. T. Brown, the purchaser at the sheriff's sale, went to the place in Maricopa County to which the said property had been transferred, took the mill into his possession, and removed it to Yavapai County. The case at bar was an action against the defendants in their partnership capacity. There was no evidence on the trial to connect the firm in any manner with the alleged trespass. The property was taken, removed, and held by W. T. Brown, who alone claimed title thereto under the sale by the sheriff. There is an entire failure of the proofs to show that any part of it came into the possession of the firm, or that the transaction was intended for its benefit. If the acts of W. T. Brown were tortious under these circumstances, he was responsible individually for the wrong committed, and not as a member of the partnership of Brown Brothers. It follows, therefore, that the judgment below was rightly in the defendants' favor, and, as the other questions raised by the plaintiff in error in his brief could not affect the result, their consideration is unnecessary. The judgment of the district court is affirmed.

Street, C. J., and Doan, J., concur.

Sloan, J., having been of counsel, took no part in this decision.

[Civil No. 726. Filed November 9, 1900.]

[62 Pac. 689.]

CHARLES K. NEWHALL, Plaintiff and Plaintiff in Error,
v. J. N. PORTER, Defendant and Defendant in Error.

1. **APPEAL AND ERROR—REVIEW—MOTION FOR NEW TRIAL—NECESSITY FOR—**ACT NO. 21, LAWS OF ARIZONA, 1893, CONSTRUED—PUTNAM v. PUTNAM, 3 ARIZ. 182, 24 PAC. 320; GREER v. RICHARDS, 3 ARIZ. 227, 32 PAC. 266; SVEA INS. CO. v. MCFARLAND, ANTE, P. 131, 60 PAC. 936, FOLLOWED.—Where the statute, *supra*, contemplates that errors occurring at the trial shall first be reviewed by the lower court upon motion for a new trial, it must be presumed that the court below would have granted a new trial if the rulings of the trial court in the admission and rejection of evidence had been urged as a ground for a new trial, and had constituted error; and there can be no review of alleged error which might have been good ground for new trial, unless the same shall have been presented to such court by motion for a new trial.
2. **SAME — JUDGMENT — FINDINGS — GENERAL — VALIDITY OF JUDGMENT BASED UPON—**ACT NO. 22, LAWS OF 1897, CITED—DAGGS v. HOSKINS, 5 ARIZ. 300, 52 PAC. 357; MCGOWAN v. SULLIVAN, 5 ARIZ. 334, 52 PAC. 986; MAIN v. MAIN, ANTE, P. 149, 60 PAC. 888, FOLLOWED.—A judgment based upon a general finding upon the issues in favor of the defendant is valid under act No. 22, *supra*.
3. **APPEAL AND ERROR—VERDICT—EVIDENCE—CONFLICT.**—Where it is essential to plaintiff's recovery that he establish a partnership, and the evidence upon this point is meager, conflicting, and far from satisfactory, the trial court was justified in finding for the defendant upon the issue, and such finding will not be disturbed on appeal.

WRIT OF ERROR from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

A. B. McMillan, and Thomas Armstrong, Jr., for Plaintiff in Error.

Moorman & McFarland, for Defendant in Error.

Courts will not review errors on appeal that were not made grounds of a motion for a new trial in the court below.

Wyoming Loan and Trust Co. v. Holliday, 3 Wyo. 386, 24 Pac. 193; *United States v. Trabling*, 3 Wyo. 144, 6 Pac. 721; *Maloy v. Berking*, 11 Mont. 138, 27 Pac. 442; *Anderson v. Connecticut Mut. Life Ins. Co.*, 55 Kan. 81, 39 Pac. 1038; *Haight v. Tryon*, 112 Cal. 4, 44 Pac. 318; *Harris v. Van De Venter*, 17 Wash. 489, 50 Pac. 50; *Smith v. Smith*, (Cal.) 48 Pac. 730; *Schaum v. Watkins*, 6 Kan. App. 923, 50 Pac. 951.

DAVIS, J.—The plaintiff in error, Charles K. Newhall, claiming to be the surviving partner of a partnership alleged to have existed between himself and one George Smith until the latter's decease, and as such to have been in the possession of partnership assets consisting of a herd of cattle, some horses, and saddles, brought an action in the court below against the defendant in error, J. N. Porter, to recover damages for the alleged wrongful conversion by him of the afore-said property. Porter, denying the claim of partnership, and averring the ownership of the property to have been in the said George Smith individually, based his right to the control and possession thereof upon the fact of his being the duly qualified and acting administrator of the estate of the said decedent. Several defenses were pleaded in the answer, but the main issue at the trial was upon the question as to the existence of the partnership relation between Newhall and Smith. There was no written agreement, and the plaintiff relied upon evidence of the conduct and declarations of the parties to show the partnership. The cause was tried before the court, sitting without a jury, and a judgment was rendered in the defendant's favor. A motion by the plaintiff for a new trial was denied, and he brings the case here for review.

Numerous assignments of error are made. Seven of these are predicated upon rulings of the lower court in the admission or rejection of evidence. Upon referring to the motion for a new trial in this case, we find the same to have been based upon the following grounds: 1. That the judgment is contrary to the law and the evidence; 2. That the judgment is not supported by the facts proved and admitted at the trial; 3. That the court's findings of fact are not sustained or warranted by the evidence; and 4. That the con-

clusions of law are not according to the facts, and the findings of fact are not supported by the evidence. Our statute provides that "every motion for a new trial shall be in writing and shall specify generally the grounds upon which the motion is founded. . . . Upon the general ground that the court erred in admitting or rejecting evidence, the court shall review all rulings during the trial upon questions of evidence. Upon the general ground that the court erred in charging the jury and in refusing instructions asked, the court shall review all the charge and every portion thereof and the ruling refusing any instruction asked, and it shall not be necessary in the motion to set out the particular portion alleged as erroneous. Upon the general ground that the evidence does not sustain the judgment or the verdict, the court shall review the sufficiency of the evidence in the case to maintain the judgment or verdict, without more particular specification in the motion." Act No. 21, Laws 1893. The law thus contemplates that errors occurring at the trial shall first be reviewed by the lower court upon the motion for a new trial. In the case before us the rulings of the trial court in the admission and rejection of evidence were not urged as a ground for new trial. If they constituted error, we must presume that the court below would, upon application, have corrected it by granting a new trial. The rule laid down by this court in *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320, that it will not review any alleged error which might have been good ground for a new trial in the court below, unless the same shall have been presented to such court by motion for a new trial, has been uniformly adhered to. *Greer v. Richards*, 3 Ariz. 227, 32 Pac. 266; *Svea Ins. Co. v. McFarland*, ante, p. 131, 60 Pac. 936. As was said in the case of *Putnam v. Putnam*, supra: "To hold that this court may consider errors occurring at the trial which were not urged upon motion below as grounds for a new trial, and which, therefore, could not have been considered by the court below, is inconsistent and illogical." The rulings of the trial court upon questions of the admissibility of evidence which are here complained of not having been first brought to the attention of that court by the motion for a new trial, any error based thereon will now be disregarded. The eighth assignment of error relates to a question as to the

sufficiency of the verification of the answer, which appears never to have been presented to the trial court, and cannot, for the first time, be raised here.

It is assigned for error that the lower court failed to make any findings of fact or conclusions of law in this case. The record shows a general finding upon the issues in favor of the defendant, and we have repeatedly held that a judgment based upon such finding is valid under the act of the legislature approved March 16, 1897 (act No. 22, Laws 1897). *Daggs v. Hoskins*, 5 Ariz. 300, 52 Pac. 357; *McGowan v. Sullivan*, 5 Ariz. 334, 52 Pac. 986; *Main v. Main*, ante, p. 149, 60 Pac. 888.

The remaining assignments of error, in effect, raise the question whether the evidence sustains the judgment. It was essential to the plaintiff's recovery in this case that he establish his partnership relation with the said George Smith in the ownership of the disputed property. An examination of the evidence upon this vital point shows it to be meager, conflicting, and far from satisfactory, as supporting the claim of partnership. If the district court held that the plaintiff failed to show the existence of a partnership, as we are led to presume, the evidence affords ample justification for such a finding, and the supreme court will not disturb it. There appearing no error in the record, the judgment of the court below is affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 651. Filed November 9, 1900.]

[62 Pac. 695.]

CLINTON B. WISER et al., Plaintiffs and Appellants, v.
JOHN LAWLER et al., Defendants and Appellees.

1. **APPEAL AND ERROR—ASSIGNMENT OF ERROR—SUFFICIENCY.**—An assignment of error alleging that “the district court erred in decreeing that the plaintiffs are entitled to no relief in the case” is too general for consideration on appeal.
2. **SAME—SAME—SAME.**—An assignment that “the court erred in refusing and rejecting findings of fact, and each of them, submitted

by plaintiffs," referring to nineteen different findings submitted by plaintiffs, only eight of which are presented in the abstract of record furnished this court, is too general and indefinite for consideration upon appeal.

3. **SAME—SAME—SAME.**—An assignment of error alleging that "the findings of the court are incomplete and erroneous," with no statement of specifications wherein the error or incompleteness consists, is too general to be considered on appeal.
4. **APPEAL AND ERROR—EQUITY—REVIEW—SCOPE—DECISIVE ISSUES.**—On appeal in an equity case, the appellate court will only look into and review the determination by the lower court of those issues which are decisive of the interests and rights of the parties and controlling in the disposition of the case.
5. **ESTOPPEL—MINES AND MINING—PROSPECTUSES—CONTENTS—EVIDENCE REVIEWED.**—Defendants contracted to sell a group of mines, title to pass upon full payment of all installments of the purchase price. The purchasers assigned their interest to a corporation, which again assigned that interest to another corporation, both assignments being made subject to the original agreement. The second corporation having failed to pay an installment of the purchase price when it became due, plaintiff, a stockholder therein, sought to estop defendants from asserting title to said mines on the ground that they had been parties to fraudulent prospectuses issued by the corporation. Defendants had known of a prospectus prepared for distribution in England which was fastened to the minute-book of the company. This prospectus was never issued, and did not contain a statement that the mines were owned by the company, and was therefore immaterial. One of the defendants knew that the corporation was about to issue an American prospectus, and while in the office of the company was shown a map of the mines. He testified that he did not see on the map any words stating that the mines were owned by the company, as appeared on a map circulated with the prospectus, and the surveyor who prepared the original map testified that he never placed on said map any such words. The prospectus states: "This company is formed to acquire on October 1st, 1892, . . . the Seven Stars Gold Mine." The evidence only shows that the defendants knew of the preparation and circulation of the prospectus and map. It is not shown that they knew what was contained in said prospectus or on the map or that any duty was imposed upon them to ascertain anything in regard to them. It does not appear that defendants were the authors of any false or fraudulent statements either in the prospectus or on the map calculated to mislead or deceive innocent purchasers or that they or either of them had knowledge of any such statements and the falsity thereof and stood by in silence while innocent purchasers were misled thereby. The facts, therefore, present no case for the doctrine of equitable estoppel.

6. **APPEAL AND ERROR—REVIEW—FINDINGS OF FACT—REFUSAL TO FIND EVIDENTIARY FACTS.**—The refusal of the trial court to make findings relating merely to evidentiary facts will not be reviewed by this court on appeal.
7. **ESTOPPEL—MINES AND MINING—ALLOWING POSSESSION, WHERE IN ACCORDANCE WITH AGREEMENT DOES NOT CREATE ESTOPPEL.**—Defendants, having agreed to sell a group of mines, and having given a deed in escrow until final payment of all installments of the purchase price and all rights having been assigned by the original purchasers to a corporation of which plaintiffs were stockholders, and default having been made in the payment of one of the installments, are not estopped to assert their title to the mines by reason of the fact that the corporation was in possession of and working said mines in accordance with the terms of the escrow agreement, the evidence disclosing that the defendants did not know during the time of the occupation and possession of the property by the corporation that the plaintiffs as purchasers of the stock were ignorant of the provisions and the terms of the escrow agreement, or that they as such purchasers had been informed or believed that the corporation owned the title to the mines instead of holding and working them under the license of the escrow agreement.
8. **SAME—SAME—RECEIPTS OF RETURNS FROM ORE—BEING IN ACCORDANCE WITH AGREEMENT DOES NOT CREATE ESTOPPEL.**—Defendants having agreed to sell a group of mines, and having given a deed in escrow until final payment of all installments of the purchase price, and all rights having been assigned by the original purchasers to a corporation of which plaintiffs were stockholders, and default having been made in the payment of one of the installments, defendants are not estopped to assert their title to the mines by reason of the fact that they have received the returns from the ore obtained from such mines during the ownership by the corporation, such disposition of the receipts from the ore being in accordance with the provisions of the escrow agreement, of which the corporation was fully cognizant.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Webster Street, Judge. **Affirmed.**

The facts are stated in the opinion.

T. W. Johnston, and Kretzinger, Gallagher & Rooney, for Appellants.

In statements sent to the public for the purpose of inducing investments in a corporation, representations of fact must be made with strict accuracy, and no fact material to the

investment should be omitted. *Bispham on Equity*, sec. 208; *Directors etc. v. Kirck*, 2 L. R., Eng. & Ir. App. 113; *Railway Co. v. Muggeridge*, 1 Drew. & S. 363; *Edington v. Fitzmaurice*, 29 Ch. Div. 459; *Henderson v. Lacon*, L. R. 5 Eq. 262; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915.

The prospectus and accompanying documents must be construed together to determine meaning of any part. *Schyville etc. Co. v. Moore*, 2 Whart. 491.

The court in reading statements of this character circulated generally among the people will consider how they would influence the ordinary mind. *Railway Co. v. Muggeridge*, 1 Drew & S. 363; *Sessions v. Rice*, 70 Iowa, 306, 30 N. W. 737; *Arnison v. Smith*, 41 L. R. Ch. Div. 359; *Elsworth v. Campbell*, 85 Iowa, 532, 54 N. W. 477.

Due weight should be given to the testimony of the large number of persons who say they were led by the statements of the prospectus to believe the company the absolute owner of the mines. *Clark v. Dickson*, 95 Eng. Com. L. R. 463.

The public had the right to rely on the prospectus without inquiry. *Bosher v. Richmond*, 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; *Clark v. Dickson*, 95 Eng. Com. L. R. 463; *Wilson v. Higby*, 62 Fed. 723; *Quirk v. Thomas*, 6 Mich. 120; *Morgan v. Skiddy*, 62 N. Y. 325; *Thompson on Corporations*, sec. 1312.

The false representation must be material to the investment, but it need not be the sole inducement. *Morgan v. Skiddy*, 62 N. Y. 319; *Peek v. Derry*, 37 L. R. Ch. Div. 541; 1 *Bigelow on Fraud*, p. 544; *James v. Hodsohn*, 47 Vt. 127; *Arnison v. Smith*, 41 L. R. Ch. Div. 359; *Putsford v. Richards*, 17 Beav. 96; *Smith v. Chadwick*, 20 L. R. Ch. Div. 27.

The law presumes that subscriptions coming in within a reasonable time after the general circulation of a prospectus were induced by it. "The estoppel will be extended far enough to protect every one who may have been presumed to have acted upon or governed by it." *Herman on Estoppel and Res Adjudicata*, secs. 794, 795; *Hatch v. Spooner*, 13 N. Y. 642; *Bradley v. Poole*, 98 Mass. 183, 93 Am. Dec. 114.

Lawler and Wells are estopped to disturb the appearance and representation of ownership of the mines in the Seven Stars Company. *Gill v. Griffith & Schley*, 2 Md. Ch. 270; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 353; 2 *Pomeroy's Equity Jurisprudence*, sec. 802; *Jones v. Bolles*, 9 Wall. 364;

Horn v. Cole, 51 N. H. 287, 12 Am. Dec. 111; *Jowers v. Phelps*, 33 Ark. 465; *Lucas v. Hart*, 5 Iowa, 415; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; Herman on Estoppel and Res Adjudicata, 938, 939, 943, 952, 953, 954; *Nettlewell v. Watson*, L. R. 26 Ch. Div. 507; *Carincross v. Lorimer*, 3 Macq. App. Cas. 829; *Truesdale v. Ward*, 24 Mich. 117; *O'Connor v. Clark*, 170 Pa. St. 318, 32 Atl. 1029; *Bank v. Roop*, 48 N. Y. 392; *Hayen v. O'Hagan*, 60 Mich. 150, 26 N. W. 861; *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939, 20 Atl. 625; *Tilton v. Nelson*, 27 Barb. 595; *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316, and note; *Richardson v. Hyams*, 1 La. Ann. 286.

The principle of the doctrine of equitable estoppel is honesty and fair dealing, and in its application the court seeks to make the parties do what honesty and fair dealing require. No contractual or fiduciary relation is necessary; knowledge imposes the duty. *Logan v. Gardner, supra*; *Anderson v. Hubble, supra*; *The Ottumwa Belle*, 78 Fed. 643.

Intent to mislead is unnecessary; "fraudulent effect" or "unjust result" is sufficient. *Dair v. United States*, 16 Wall. 1, 4; *Hill v. Blackwelder*, 113 Ill. 283; *The Ottumwa Belle, supra*; *Horn v. Cole, supra*; *Anderson v. Hubble, supra*.

Presence of title on record is no excuse or justification for acquiescence, participation, and receipt of benefits here shown on part of Wells and Lawler. *Sumner v. Leaton*, 47 N. J. Eq. 103, 19 Atl. 884; *Carr v. Wallace*, 7 Watts, 394; *Markham v. O'Connor*, 52 Ga. 183.

There need be no direct communication between parties claiming the estoppel and the party alleged to be estopped. *Anderson v. Hubble, supra*; *Clark v. Dickson*, 95 Eng. Com. L. R. 463; *Kelley v. Frick*, 110 Ind. 552, 11 N. E. 453; *Stevens v. Ludlum*, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771.

"Standing by" does not necessarily mean actual presence. *Anderson v. Hubble, supra*; Herman on Estoppel and Res Adjudicata, sec. 954.

Estoppel may arise in favor of one not purchasing directly into the title. The doctrine has been applied for the protection of stockholders and creditors. *Jones v. Bolles*, 9 Wall. 364; *Trenton Nat. Bank v. Duncan*, 86 N. Y. 222; Herman on Estoppel, sec. 397; *Livermore v. Maxwell*, 87 Iowa, 705, 55 N. W. 37.

These persons defrauded in the act of purchasing stock are

under no theory of the law chargeable with notice of what the records of the company disclosed. Even stockholders are not chargeable, as matter of law, with notice of the acts of officers or resolutions of the directors. Thompson on Corporations, sec. 4455; Cook on Stockholders, sec. 731.

A party who receives benefits gained by representations that the title to his property is in another will not be permitted to assert rights inconsistent with the transaction to the injury of the person misled. *Brewster v. Baker*, 16 Barb. 613; *Breedens v. Stamper*, 57 Ky. 174; *Whittaker v. Williams*, 20 Conn. 109.

A party cannot participate in the fruits of a fraud and at the same time repudiate it as not his act. *Texas etc. Co. v. Dublin Compress Mfg. Co.*, (Tex. Civ. App.) 38 S. W. 404; *Olmstedt v. Hatuling*, 1 Hill, 317; *Cran v. Hunter*, 28 N. Y. 389; *Morse v. Ryan*, 26 Wis. 356.

"He who receives money or property or a benefit of any kind, under an instrument, whatever its character or his relation to the maker, cannot question the instrument in whole or in part." *In re Peaslee's Will*, 73 Hun, 113, 25 N. Y. Supp. 940; *Havens v. Sackett*, 15 N. Y. 365; *Birmingham v. Kirwin*, 2 Schoales & L. 444; *Wood v. Seeley*, 32 N. Y. 105.

In addition to the foregoing, the following are different applications of the same principle that here estops Lawler and Wells from asserting their legal rights under the Cowland contract to the injury of these purchasers of stock, after having affirmed the representation of title and apparent ownership in the company by receiving the gross proceeds of the company's operation, the fifty thousand dollars in stock, the superintendency of Lawler, and the \$112,339.96 sent from New York on behalf of the company. *Field v. Doyon*, 64 Wis. 560, 25 N. W. 653; *Leathers v. Ross*, 74 Iowa, 630, 38 N. W. 516; *Maple v. Kussart*, 53 Pa. St. 348, 91 Am. Dec. 214; *Herman on Estoppel and Res Adjudicata*, secs. 800, 1063; *McConnell v. People*, 71 Ill. 487; *Daniels v. Tearney*, 102 U. S. 415; *Franklin v. Pollard Mill Co.*, 88 Ala. 318, 6 South. 685; *Swain v. Seamans*, 9 Wall. 254; *Fry v. Morrison*, 159 Ill. 244, 42 N. E. 774; *Robinson v. Elliott*, 22 Wall. 513; *Gill v. Griffith & Schley*, 2 Md. Ch. 270; *Wendell v. Van Rensselaer*, *supra*.

The concealment of the important terms of a transaction or the secret retention of benefits by a grantor has always

been held sufficient to show the fraud of a transaction and support a decree for the restoration of the property or money of the deceived purchaser or creditor. *Robertson v. Elliott*, 22 Wall. 513; *Gill v. Griffith & Schley*, 2 Md. Ch. 270; *Wendell v. Van Rensselaer*, *supra*.

That one or two of the stockholders may have purchased with knowledge of the fraud is no defense. Otherwise, to corrupt one would save the fraud. *New Sombrero Co. v. Erlanger*, 5 L. R. Ch. Div. 73.

Equitable estoppel is frequently held a ground for affirmative relief. *Jones v. Bolles*, 9 Wall. 364; *Kirk v. Hamilton*, 102 U. S. 68; *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316, and note; *Lucas v. Hart*, 5 Iowa, 415; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394, and note; *Drexel v. Berney*, 122 U. S. 241, 7 Sup. Ct. 1200.

The estoppel is commensurate with the representation and operates to put the title where it was represented to be. *Grisster v. Powers*, 81 N. Y. 57, 37 Am. Rep. 475; Beach on Equity Jurisprudence, 800; *Trenton Baking Co. v. Dinan*, 86 N. Y. 221; *Ellsworth v. Campbell*, 85 Iowa, 532, 54 N. W. 477.

A court of equity has power to decree a title to real estate as against a party whose conduct raises an estoppel. *Jones v. Bolles*, 9 Wall. 364; *Lucas v. Hart*, 5 Iowa, 415; *Kirk v. Hamilton*, 102 U. S. 68; *Robbins v. Moore*, 129 Ill. 57, 21 N. E. 934; *Stone v. Tyree*, 30 W. Va. 701, 5 S. E. 878; *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316, and note.

Granting that Lawler and Wells may keep the property, it would be so unjust and fraudulent for them at the same time to retain the money that equity will decree its repayment to the stockholders. *Field v. Doyon*, 64 Wis. 560, 25 N. W. 653; *Piper v. Hoard*, 107 N. Y. 73, 1 Am. St. Rep. 789, 13 N. E. 626; *Day v. Brenton*, 102 Iowa, 483, 63 Am. St. Rep. 460, 71 N. W. 538; *Maple v. Kussart*, 53 Pa. St. 348, 91 Am. Dec. 214; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392; *Story's Equity*, secs. 1255, 1256; *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75, 30 N. W. 440.

E. M. Sanford, J. F. Wilson, and Herndon & Norris, for Appellees.

The language of the prospectus must be clear and unambiguous as to a fact to constitute a misrepresentation. Fuller,

C. J., in *Farrer v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, the gist of the action being misrepresentation of title, said: "The representation must be in regard to a material fact, must be false, and must be acted upon by the other party, in ignorance of its falsity." In *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, an action for deceit, Blatchford, J., said: "The representation must be deliberately made and in such a way as to give the *person to whom it is made* reasonable grounds for supposing it was meant to be acted upon, and *has been acted upon by him accordingly*. . . . There must be an assertion of a fact in which a person entering into the transaction relied on, and in the absence of which it is reasonable to infer that he would not have entered into it, or at least not on the same terms. Both facts must concur."

Slaughter v. Gerson, 13 Wall. 379, is an action to recover purchase price of a steamboat, and it was said: "It must be a representation upon which he relied and by which he was actually misled to his injury."

"A representation the falsity of which will afford a ground of action for damages must be of an existing fact; it must be an affirmative statement or affirmation of some fact, in contradistinction to a mere expression of opinion, which ordinarily is not presumed to deceive or mislead." *Watkins v. West & Co.*, 92 Va. 1, 22 S. E. 556. See, also, *Cooley on Torts*, 555; *Smith v. Richards*, 13 Pet. 26; *Thompson on Corporations*, 1478, 1479; *Cook on Stockholders*, 355; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *Stetson v. Riggs*, 37 Neb. 797, 56 N. W. 628; *Runge v. Brown*, 23 Neb. 817, 37 N. W. 660; *Cox v. Highley*, 106 Pa. St. 249; *Columbia Electric Co. v. Dickson*, 46 Minn. 463, 49 N. W. 244; *Wheadon v. Huntington*, 83 Hun, 371, 31 N. Y. Supp. 913.

The language of the prospectus is ambiguous and puts the investor on inquiry. The prospectus says: "This company presents an unusual opportunity for investors to *acquire* an interest in one of the richest and most extensive gold mines in the world."

Acquire is "to gain; to obtain; to procure." (Webster's Dictionary.) Anderson gives a like definition, and that it is equivalent to "hold," and, relating to property, embraces two ideas, actual possession of some object of property, and being vested with the legal title. It may be applied to any

thing the subject of property, in law or equity, and "property," when applied to land, comprehends any species of title inchoate or incomplete. It embraces rights which lie in contract; those which are executory and those which are executed. *Soulard v. United States*, 4 Pet. 512. So possession may be treated as property. *King v. Gotz*, 70 Cal. 240, 11 Pac. 656. It is "any thing that goes to make up one's wealth or estate." *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307.

The word "belonging" does not necessarily indicate title. As a verb it is something which concerns or attains to, or the property of. (Webster's Dictionary.) The words "belonging to the same owner" in a statute were construed in *People v. Cady*, 105 N. Y. 299, 11 N. E. 810, to not mean the technical owner of the title. *Orr v. Goodlow*, 93 Va. 263, 24 S. E. 1014; *Lynch v. Murphy*, 50 N. C. 623.

So a statement in a deed "that land is to be paid for in sheep" is sufficient to put one on inquiry. *Bergman v. Blackwell*, (Tex. Civ. App.) 23 S. W. 243.

Involving the same principle are *Fredinberg v. Lyon Lake Church*, 37 Mich. 476; *Ferson v. Sanger*, 8 Fed. Cas. 1153.

"Equity will not relieve a party from the consequences of his own inattention and carelessness in relying upon the representation of another instead of his own judgment." *Gammill v. Johnson*, 47 Ark. 335, 1 S. W. 610.

So the meaning of words and terms used in a document must be determined by their known and approved signification; not by the statements of the parties. *Pillsbury v. Locke*, 33 N. H. 96, 66 Am. Dec. 713.

DOAN, J.—On and prior to the twelfth day of May, 1892, John Lawler and Ed. W. Wells were the owners and in possession of the mines and mining claims located in the Eureka mining district in Yavapai County, Arizona, known as "Hillside," "Happy Jack," "Contact No. 1," "Contact No. 2," and "Camp," and locations known as "Midnight," "Morning Glory," "Water," "Hidden Treasure," "Sucker," "Side," "Purple Rose," "Southern Belle," "Robert E. Lee," "Lucky Cuss," "Centipede," and "Good Enough," which are hereby denominated and will be hereinafter referred to as the "Hillside group of mines." The muniments of title showing such ownership in Lawler and Wells were

then, and have been ever since, on record in the office of the recorder of said county of Yavapai, territory of Arizona, where said mines are situate. Lawler and Wells offered said mines for sale at the purchase price of four hundred and fifty thousand dollars cash. A few days prior to May 12, 1892, H. H. Warner visited this group of mines with T. A. Rickard, a mining expert, and examined the same. After such examination he contracted for the purchase of said group from Lawler and Wells for the sum of four hundred and fifty thousand dollars, paying twenty thousand dollars in cash, the remainder payable in installments, in accordance with the terms of an escrow agreement entered into on May 12, 1892, by and between John Lawler and Ed. W. Wells on the one part and Charles Cowland on the other part, which provided, among other things, that "the deed conveying the mine to Cowland be annexed to said agreement, and shall be held in escrow with the Bank of Prescott (Arizona), at Prescott, Arizona, to be held and delivered by the bank upon the following conditions only: The bank to deliver the deed to Cowland, his heirs or assigns, upon his or their paying or causing to be paid, as herein provided for, the full sum of four hundred and fifty thousand dollars (\$450,000). In case of failure of said Cowland in making or causing to be made any of said payments of money at the time or times and in the manner herein stated, then the said Bank of Arizona, upon demand being made thereupon by said Lawler and Wells, shall deliver said deed to Lawler and Wells, or their representatives; and, in the event of such failure of said Cowland to make or cause to be made any of the said payments, then all payments of money theretofore made by said Cowland on the purchase price of said property shall be forfeited by him, and he agrees and covenants with said Lawler and Wells that all money paid by him as purchase money on said property shall belong to them, and be retained by them as liquidated damages accruing to them for the failure of said Cowland to purchase, take, and pay for said property as hereinabove stated and stipulated, and the said Lawler and Wells shall be at once released and discharged from any further duty or obligation to sell and convey the property. It is further agreed that said Cowland, by himself and his agents, may at once enter

into and upon said property, and take possession thereof, subject, however, to the legal possession of said Lawler and Wells; and the said Cowland may use, possess, explore, develop, work, and operate the said property, and all the proceeds derived from such use, development, operation, and working of the same, and from the ores taken therefrom shall be at once paid to said Lawler and Wells, and be applied to and credited upon the payment hereinabove stipulated to be made by said Cowland. It is further agreed that said Lawler and Wells shall retain and remain in possession of said property until the full payment of purchase price shall be made, and Cowland recognizes and agrees to such possession, and any and all use made of, by, or on the part of the said Cowland shall be considered of said Lawler and Wells' possession as aforesaid. Lawler and Wells shall not work the said property, or operate the said mine, nor interfere with the use, working, and operation of said Cowland. It is further agreed that if the said Cowland shall fail to make the payments as above stated, and shall fail to take and pay for said property as above stated, that all improvements made on said property, and all development made thereon and therein, and all ores taken therefrom, shall be the property of said Lawler and Wells, and shall not be removed by said Cowland, and the costs and expenses thereof shall in no manner be charged against said Lawler and Wells or against said property; that said Cowland shall have the right to work and operate the machinery and to use the property mentioned in said deed during the continuance of said contract and until the forfeiture thereof on his part; and in case of a forfeiture of contract on the part of said Cowland by failure to comply with any of the provisions thereof, or to make any payment as herein provided, then he agrees to at once surrender and deliver possession of said property to said Lawler and Wells." On the twelfth day of May, 1892, and contemporaneously with the execution of said agreement, a deed to the said Charles Cowland was executed by John Lawler and Ed. W. Wells and wife particularly describing the said Hillside group of mines, and conveying the same to Cowland for the purchase price of four hundred and fifty thousand dollars. Contemporaneously with the signing of said agreement and deed the said H. H. Warner signed an instrument

in writing guaranteeing that the said Charles Cowland will carry out and perform the condition of said agreement above referred to. Afterwards, and on the same day, the agreement, deed, and instrument of guaranty were by the said Warner, John Lawler, and Ed. W. Wells deposited with the Bank of Arizona at Prescott, as the escrow holder thereof, in accordance with the terms, conditions, and provisions contained in said escrow agreement. While the escrow agreement and deed were executed in the name of Charles Cowland, the said Cowland was the agent of H. H. Warner, and Warner was the real party in interest in the transaction. The escrow agreement, deed, and guaranty were never recorded, but remained in the possession of the bank, as the escrow holder thereof, until November 10, 1893. About the fifteenth day of May, 1892, Lawler delivered to T. A. Rickard, as the agent of Cowland, the occupation of the said group of mines under the terms and conditions of the license contained in the escrow agreement, and the mines were operated until June 15th by and at the expense of the H. H. Warner Investment Company. On the fourteenth day of June the said H. H. Warner, Charles Cowland, W. M. Earl, W. R. Kennard, and Frank B. Bowen organized and incorporated under the laws of New Jersey the Industrial Mining and Guaranty Company, with a capital of five hundred thousand dollars, for the purpose of handling mines and industrial enterprises, buying and selling stock, etc.; and on the fifteenth day of June, 1892, said Charles Cowland transferred to the said Industrial Company his interest in the mining property involved in this suit for the purpose of handling, operating, and offering the same to the public, giving at that time to the said Industrial Mining and Guaranty Company a written assignment of all his right to said escrow agreement and a deed to his interest in and to the said agreement between him and the said Lawler and Wells, together with his right, title, and interest in the property described therein, reciting the deposit in escrow of the said agreement and the accompanying deed of date of May 12, 1892, and stating that the Industrial Company is to have the same right as Cowland under said deed and agreement, and is made the agent of Cowland to perform the conditions and provisions of the agreement, and upon such performance to receive the deed.

H. H. Warner, on said June 15th, made and delivered to the Industrial Mining and Guaranty Company his written consent to the making of said assignment and deed by Cowland. The Industrial Mining and Guaranty Company then, by resolution of the board of directors, assumed all the covenants, conditions, and agreements in the said escrow agreement of May 12, 1892, and promised to carry out and perform all the terms, conditions, and covenants contained therein on the part of Cowland, and to make the payment for said mines and mining property as provided for in the said escrow agreement. On the fifteenth day of June, 1892, T. A. Rickard delivered to the Industrial Mining and Guaranty Company the occupation of said group of mines, and the company thereupon entered into such occupancy, and remained therein until the first day of October, 1892. On the fifteenth day of August, 1892, said H. H. Warner, W. M. Earl, and one R. S. Hudspeth incorporated the Seven Stars Gold Mining Company, under the laws of New Jersey, with a capital of three million dollars, the object and purpose of said corporation being to hold, operate, and convey mines. The said H. H. Warner was the president of the Industrial Mining and Guaranty Company, and was also a director in and president of the Seven Stars Gold Mining Company. On September 10, 1892, the Industrial Mining and Guaranty Company, through its board of directors, offered to sell and convey all its right, title, and interest in the following mining properties, a portion of which are described in the escrow agreement and deed, to wit, the "Seven Stars," "Happy Jack," "Contact No. 1," "Contact No. 2" mines, and the claim known as "Camp," and the locations known as "Mescal," "Elwood," "Midnight," "Waterfall," and "Boulder," to a company formed, or to be formed, and known as the Seven Stars Gold Mining Company, upon said company showing that it had placed two hundred thousand dollars for working capital in its treasury and upon receiving two million eight hundred thousand dollars in cash or stock in the Seven Stars Gold Mining Company. On the first day of October, 1892, the Industrial Mining and Guaranty Company placed the Seven Stars Gold Mining Company in occupation of the Hillside group of mines, and said latter company thereupon entered into such occupancy under the terms, conditions, and provisions contained

in the escrow agreement of May 12, 1892, by the authority of the resolution of the board of directors of the Industrial Mining and Guaranty Company just quoted. The Industrial Mining and Guaranty Company, as the agent of the Seven Stars Gold Mining Company, under date of September 24, 1892, issued a prospectus, known as the "American Prospectus," to promote the sale of the stock of the Seven Stars Gold Mining Company, and circulated the same extensively throughout the United States. The circulation began about the twentieth day of September, 1892. On October 3, 1892, the Industrial Mining and Guaranty Company, as agent for the Seven Stars Gold Mining Company, authorized and directed an English prospectus to be issued, but such prospectus was not in fact ever issued or circulated in England or elsewhere. A prospectus was issued and circulated in England without the authority of the Industrial Mining and Guaranty Company or the Seven Stars Gold Mining Company. Such prospectus was prepared, supervised, and circulated by Charles Cowland. The descriptive matter in the prospectus was based upon data furnished by the officers of the Industrial Mining and Guaranty Company. The circulation commenced about October 5, 1892, and amounted to eighty thousand copies. On the fifteenth day of May, 1892, at the Hillside mines, Lawler and Wells delivered to T. A. Rickard a report previously made upon said mines, known as the "Blauvelt Report," together with a map of the underground workings of said mines, as such workings then existed, known as the "Blauvelt Map"; also copies of smelter and milling returns of ore which had been previously shipped from said mines and reduced, and known as "smelter returns." On September 28, 1892, at the request of H. H. Warner, Lawler sent by express to Warner, in New York City, the original of said smelting and milling returns. On August 27, 1892, Ed. W. Wells visited the office of the Industrial Mining and Guaranty Company in New York City, and had an interview with H. H. Warner, president of that company and of the Seven Stars Gold Mining Company. On the thirtieth day of August, and between that day and September 3, 1892, John Lawler was in the office of the Industrial Mining and Guaranty Company in New York City, and learned that the American prospectus was being prepared for circulation for the

purpose of promoting the sale of the stock of the Seven Stars Gold Mining Company, and also became aware that the Blauvelt reports and map and copies of the smelter returns were being used as a basis of description of the Hillside group of mines to be contained in the proposed prospectus.

On October 28, 1892, H. H. Warner, in Prescott, represented to Lawler and Wells that he was unable to place securities that he held in time to meet the payment of that portion of the purchase price falling due November 12, 1892, and, relying upon said representations, on request of Warner, Lawler and Wells, on October 28, 1892, agreed to an extension of the time of payment under the agreement of May 12, 1892, and provided that the original agreement remain in full force except as to said modification touching the time of payment. On May 8, 1893, Warner made a general assignment of his property for the benefit of his creditors, and on May 11, 1893, Lawler and Wells, knowing of the assignment of Warner, executed an agreement with Charles Cowland stipulating that the payment mentioned in the original escrow agreement as falling due on May 12, 1893, may be made by said Cowland as follows: \$9,098 in cash, and \$4,500 to be paid on the first day of June, 1893, and the like sum to be paid on the first day of each of the following months,—viz., July, August, September, October, and November. A part of the consideration for the agreement for the extension of the time of payment was the issuance and delivery to Lawler and Wells of fifty thousand dollars, par value, of the guaranteed capital stock of the Seven Stars Gold Mining Company, and the appointment of John Lawler manager of operation of the Hillside group of mines; and John Lawler, on May 13, 1893, entered upon his duties as such manager. On the eighteenth day of August, 1893, the chancery court of New Jersey appointed John Griffin receiver of the Industrial Mining and Guaranty Company, and the said John Griffin qualified and entered upon his duties as receiver that day. The Seven Stars Gold Mining Company, from October 1, 1892, until August 17, 1893, continued to occupy and operate the Hillside group of mines under and by virtue of the occupation thereof so given to it by the Industrial Mining and Guaranty Company, under the terms, conditions, and provisions contained in the escrow agreement of May 12, 1892. On September 1, 1893,

neither Charles Cowland, nor the said receiver, nor the plaintiffs, nor any one of them, paid or offered to pay to Lawler and Wells the sum of four thousand five hundred dollars, payable on that day, according to the terms and conditions of the aforesaid escrow agreement and modifications thereof; nor has Cowland, nor has any one for him, paid said sum since said date; nor has Cowland, or any one for him, paid or caused to be paid any portion of any purchase money of said property falling due or payable on or after the first day of September, 1893, according to the terms and conditions of said escrow agreement of May 12, 1892. On the tenth day of September, 1893, Lawler and Wells, as owners of the legal title of the said Hillside group of mines, and claiming to exercise their rights under the escrow agreement of May 12, 1892, entered into possession of said Hillside group of mines, and from thenceforward until September 30, 1897, continued to remain in possession of said mines. On the tenth day of November, 1893, the Bank of Arizona, as escrow holder of the escrow agreement and deed dated May 12, 1892, at the request of Lawler and Wells, redelivered said deed, according to the terms of the escrow agreement, to the said Lawler and Wells. From the gross proceeds of operation by the Industrial Mining and Guaranty Company there was deposited in the Bank of Arizona, to the credit of Lawler and Wells, on account of the purchase price, in accordance with the escrow agreement of May 12, 1892, the sum of \$19,987.61. During the operation of said property by the Seven Stars Gold Mining Company a like deposit was made for the same purpose, amounting to \$47,812.25, aggregating the sum of \$67,799.86. On May 12 and 24, 1892, H. H. Warner paid Lawler and Wells, on account of the purchase price of said property, the sum of fifty-one thousand dollars, and there was paid on and between November 12, 1892, and August 4, 1893, to Lawler and Wells, on account of the purchase price of said property, under the terms of the escrow agreement, various sums, aggregating the amount of \$112,339.96.

During the life of the Industrial Mining and Guaranty Company it was engaged in promoting sundry mining, railroad, and industrial enterprises, including the business transactions of the Seven Stars Gold Mining Company. During that time it received and disbursed the sum of \$824,142.13.

From June 15, 1892, to and including August 1, 1893, the moneys which it received and disbursed on account of its various enterprises were all deposited in its name in a common fund in the Continental National Bank of New York City, and checked against, used, and disbursed by it in its various enterprises as required therein, excepting the sum of \$111,724.23, of which sum \$67,799.86 were the gross proceeds of the ore from the Hillside group of mines, and the further sum of \$43,924.37, which is composed of \$224.37, money received prior to May 11, 1893, from the sale of the Seven Stars Gold Mining Company stock, and the remainder from loans obtained by said company subsequent to May 11, 1893. Lawler and Wells did not at any time prior to the commencement of this action have any knowledge or notice that any money received by them on account of the purchase price of the Hillside group of mines, as provided for in the escrow agreement of May 12, 1892, came from the money or was any part of the money which any one or more of the purchasers of the stock of the Seven Stars Gold Mining Company had paid into the Industrial Mining and Guaranty Company on account of the purchase price of said stock. Lawler and Wells were not the promoters of, nor in any wise interested in, the organization of the Industrial Mining and Guaranty Company, nor the Seven Stars Gold Mining Company, nor in the issuance or circulation of the prospectus, nor the issuance or sale of the capital stock of either of said companies, nor in the proceeds thereof. After the eleventh day of May, 1893, the Industrial Mining and Guaranty Company received the sum of five hundred dollars, and no more, from the sale of the stock of the Seven Stars Gold Mining Company. The amount received by the Industrial Mining and Guaranty Company from the sale of the guaranteed stock of the Seven Stars Gold Mining Company aggregated \$253,128.05, of which sum \$819.08 was returned to the subscribers, and the stock canceled, making the amount of money retained by the Industrial Mining and Guaranty Company from the sale of guaranteed stock \$252,308.97. There was received from the sale of common stock of the Seven Stars Gold Mining Company \$2,583.89. The Seven Stars Gold Mining Company did not keep any books of account of receipts and expenditures of money in the New York office, but all the receipts and ex-

penditures of money on account of the operation and expenditures of the Industrial Mining and Guaranty Company and the Seven Stars Gold Mining Company during their respective operation of the Hillside group of mines were kept by the Industrial Mining and Guaranty Company in its own books of account. The Industrial Mining and Guaranty Company, between the fifteenth day of June, 1892, and the eighteenth day of September, 1893, paid out for the operating expenses and purchase of machinery and purchase price of the Hillside group of mines, dividends, and other expenses, the aggregate sum of \$380,259.81, which amounted to \$127,986.84 more than the amount of money received by it from the sale of the Seven Stars stock, and \$60,186.98 more than the aggregate amount of money received by it from the sale of stock and from the net proceeds of ore from the Hillside group of mines. During the operation of the said Hillside group of mines by the Seven Stars Gold Mining Company there was expended by the Industrial Mining and Guaranty Company for costs of operation, improvements, supplies, and machinery the sum of \$112,411.32. On and between January 13, 1893, and May 10, 1893, the Industrial Mining and Guaranty Company paid out for dividends on stock sold of the Seven Stars Gold Mining Company the sum of \$11,533.07 to holders of stock of the Seven Stars Gold Mining Company. The holders of stock of the Seven Stars Gold Mining Company did not, nor any of them, before the commencement of this suit, return or offer to return to the Seven Stars Gold Mining Company his stock, or any part thereof. Neither said stockholders, nor any of them, prior to the commencement of the action, returned or offered to return his or their portion of the dividends received by him or them from the Industrial Mining and Guaranty Company. There was never any meeting called or held of the stockholders of said Seven Stars Gold Mining Company, but on April 4, 1893, several stockholders, representing themselves and about three hundred others, voluntarily met at Jersey City, and there made demand upon John Griffin, receiver, to commence this suit, and he refused so to do. On and between the 20th of September, 1893, and September 30, 1897, Lawler and Wells received from the operations of the Hillside group of mines the sum of \$37,376.86, and disbursed in such operations during that

time the sum of \$35,658.93. Between November 17, 1893, and the commencement of this action the plaintiffs, or said receiver, or any one of them, or either of them did not make any demand upon Lawler and Wells for the possession of the properties in controversy, or any part thereof. In 1895, C. B. Wisner and twenty others, stockholders in the Seven Stars Gold Mining Company, brought suit against Lawler and Wells and others in the district court of Yavapai County, setting up the facts, and alleging that the representations of ownership as set forth in the prospectus issued September, 1892, were false and fraudulent, and that plaintiffs were misled thereby; that Lawler and Wells assisted in the preparation and circulation of the said prospectus; and prayed that the court decree Lawler and Wells to have, by their conduct, estopped themselves, as against the plaintiffs and others in like estate, from asserting that the Seven Stars Gold Mining Company is not the owner of the mines and mining property described in the prospectus and pictured on the map, requesting a provision in the said decree for an accounting, and a money judgment against Lawler and Wells upon such accounting for all the proceeds and value of ore, bullion, and other property taken from the mines and mining property and received by the said Lawler and Wells between the twelfth day of May, 1892, and the date of entry of final decree, together with a money judgment against Lawler and Wells for all damages caused by them to said mines and mining property; or that the court decree that the said plaintiffs and all others in like estate may have and recover from the said Lawler and Wells the aggregate amount of money paid by plaintiffs and others in like estate for stock in the Seven Stars Gold Mining Company; and for other relief. On May 13, 1896, after taking part of the evidence, the plaintiffs amended the bill to conform to the proofs. To this amended complaint Lawler and Wells filed general and special demurrers and a plea of estoppel in the nature of an answer. Receiver Griffin filed a short answer. The Seven Stars Gold Mining Company and the Industrial Mining and Guaranty Company were adjudged in default for want of answer. On September 22, 1897, the cause came on for hearing before Hon. H. C. Truesdale, presiding judge. Depositions were read, witnesses examined, documents offered in evidence, and

the cause exhaustively argued. Thereupon the court entered an interlocutory decree in favor of plaintiffs, calling for an accounting before a master in chancery, and appointing a receiver for the property. Pending an accounting before the special master, Judge Truesdale died. The case was then assigned to Hon. Webster Street. The report of the special master was returned July 8, 1898. On July 12, 1898, the cause was further heard before his Honor Webster Street on the report of the special master in chancery and the report of the receiver. The report was by the court examined and approved. The resignation of the receiver was accepted, and the sureties on his bond discharged from liability, and Lawler and Wells, with consent of plaintiffs, were appointed receivers without compensation, and judgment and final decree were entered in favor of plaintiffs in accordance with the findings and conclusions of Judge Truesdale, and Lawler and Wells filed a motion for a new trial. After full argument thereon, on October 22, 1898, the motion for a new trial was granted. On November 1, 1898, by consent, the prayer of the complaint having in the mean time been amended, the case was submitted for decision to Judge Street upon the pleadings and the evidence then in the record, and upon the arguments made on the motion for a new trial, whereupon the court held that plaintiffs were entitled to no relief, and ordered the dismissal of the complaint. The dismissal carried the cross-bill with it. Findings of fact and conclusions of law were made and filed in the case by the court, and a decree in accordance therewith entered, and the motion for a new trial was denied. From the judgment of the court dismissing the amended complaint and overruling the motion for a new trial the plaintiffs appeal, and have presented twenty assignments of error.

Some of the assignments are too general and indefinite to receive any consideration by this court. The first assignment alleges that "the district court erred in decreeing that plaintiffs are entitled to no relief in the case." The fifth assignment alleges "the court erred in refusing and rejecting the findings of fact, and each of them, submitted by plaintiffs," referring to nineteen different findings submitted by plaintiffs, only eight of which are presented in the abstract of record furnished this court. The fifteenth assignment of

error alleged that "the findings of the court are incomplete and erroneous," with no statement or specification wherein the errors or incompleteness consist. The findings of the trial court, as presented by the record, embrace sixty-one different and distinct findings of fact. In a case very similar to this one (*The City of New York*, 147 U. S. 76, 13 Sup. Ct. 213, 37 L. Ed. 87), in which sixteen exceptions were taken to the findings of the court, twenty-one specifications of error were embodied in the seventeenth exception to the opinion of the court, and there were thirty-five exceptions to the refusal of the court to find the facts and law as requested by the claimants, Mr. Justice Brown of the United States supreme court said that it was not the duty of the court to review the testimony upon every finding of fact to which the defeated party takes an exception, and inquire whether such testimony authorized the finding. In that case the court held: First. "That the facts found by the court below are conclusive, that the bill of exceptions cannot be used to bring up the evidence for a review of these findings, that the only rulings upon which we are authorized to pass are such as might be presented by a bill of exceptions prepared as in actions at law, and that the findings have practically the same effect as the special verdict of a jury." *The Clara*, 102 U. S. 200, 26 L. Ed. 145; *The Abbotsford*, 98 U. S. 440, 25 L. Ed. 168; *The Benefactor*, 102 U. S. 214, 26 L. Ed. 157; *The Annie Lindsley*, 104 U. S. 185, 26 L. Ed. 716; *Collins v. Riley*, 104 U. S. 322, 26 L. Ed. 752; *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; *The Gazelle*, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496. Second. "That it is only the ultimate facts which the court is bound to find, and that this court will not take notice of a refusal to find the mere incidental facts which only amount to evidence from which the ultimate fact is to be obtained." *The Francis Wright*, 105 U. S. 381, 26 L. Ed. 1100; *The John H. Pearson*, 121 U. S. 469, 7 Sup. Ct. 1008, 30 L. Ed. 979; *Insurance Co. v. Allen*, 121 U. S. 67, 7 Sup. Ct. 821, 30 L. Ed. 858. Third. "If the court below neglects or refuses to make a finding, one way or the other, as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for re-

view in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial, and in the other that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in the appellate court." *The Francis Wright*, 105 U. S. 387, 26 L. Ed. 1100; *The E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. 794, 35 L. Ed. 453. "This case must then turn upon the question whether the circuit court found any facts which were wholly unsupported by testimony, or refused to find any fact material to the issue, when such fact was proven by uncontradicted evidence." This court will, in accordance with the rule laid down above, take up the assignments which are sufficiently distinct and specific to direct the attention of the court to the errors complained of, and will look into and review the determination by the lower court of those issues which are decisive of the interests and rights of the parties, and controlling in the disposition of the case.

The second assignment of error alleges that "the court erred in not decreeing relief to the plaintiffs pursuant to the first prayer of the amended complaint." The complainants pray, first, that the court decree that the defendants Lawler and Wells have by their conduct estopped themselves, and they are now estopped, as against the plaintiffs and others in like estate, from asserting that the Seven Stars Gold Mining Company is not the owner of the property described in the prospectus and pictured on the map, and that the court order, adjudge, and decree that the full title to the said mines and mining properties, and every part thereof, is in the Seven Stars Gold Mining Company; with prayer for perpetual injunction, money judgment upon an accounting for proceeds of ore and bullion taken from the mine between the 12th of May, 1892, and the date of entry of final decree, and money judgment for damages, said money judgment to run to the Seven Stars Gold Mining Company, in the interest and for the benefit of *bona fide* stockholders, plaintiffs, and others in like estate. This assignment raises and presents squarely the question whether the facts pleaded and sustained by the proof constitute an equitable estoppel against the defendants Lawler and Wells. The supreme court of Utah has said, in *Bingham Young Trust Co. v. Wagner*, 12 Utah, 1, 40 Pac. 764: "Mat-

ters pleaded by way of equitable estoppel must be of such a character, and sufficient, as pleaded, to make a cause of action for deceit on the part of the plaintiffs. The rule is stated in language of infinite variety in the many cases that have arisen in the courts. In *Branson v. Wirth*, 17 Wall. 32, 21 L. Ed. 566, the supreme court of the United States say: 'If one person is induced to do an act prejudicial to himself in consequence of the acts or declaration of another on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations.' In *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618, upon the same subject, the supreme court say: 'He who, by his language, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.' It is not necessary to quote from other authorities. The rule is easily deducible from these. It is this: In order to create an estoppel of this character, it is necessary that the plaintiff, either by language or conduct, should have—first, falsely represented or concealed a material fact; second, the false representation or concealment must have been knowingly made; third, the party pleading the estoppel must have been ignorant of the facts; fourth, the representation must have been made with the intention that it should be acted upon; fifth, the party pleading it must have been misled thereby to his injury in some substantial particular." Tested by this rule, are the facts that have been established in this case sufficient to create an equitable estoppel against Lawler and Wells as to the plaintiffs in the case? There are no allegations of fraud, misrepresentation, or concealment by Lawler and Wells in their dealings with Warner and Cowland in the contract for the disposal of the mines to those persons. The claim is based upon misrepresentation alleged to have been made by Lawler and Wells, in conjunction with Warner and the officers of the Industrial company in the preparation and circulation of the American prospectus and accompanying map distributed to the stockholders of the Seven Stars Gold Mining Company, asserting the ownership in the mines to be in the Seven Stars Company; and the like action on the part of Lawler and Wells, with the same parties, in the preparation and distribution of the English prospectus containing the same assertion.

We will first consider the English prospectus. The complaint alleges that about September 27, 1892, there was issued another printed prospectus for the purpose of distribution in England and Scotland; that this said prospectus was prepared by said Warner and the officers of the said gold company, with the assistance, knowledge, consent, sanction, and acquiescence of the said Lawler and Wells, in and by which prospectus it is stated that "the mines owned by the company are situated in the Eureka Mining District, Arizona"; that the said prospectus was generally circulated in London and other cities of England, and also in cities and towns of Scotland. The district court found as a fact that on October 3, 1892, the Industrial Mining and Guaranty Company, as the authorized agent of the Seven Stars Gold Mining Company, did authorize and direct an English prospectus to be issued; that such prospectus was never circulated in England or elsewhere; that a prospectus was issued and circulated in England without the authority of the directors of the Industrial Mining and Guaranty Company or the Seven Stars Gold Mining Company; that neither John Lawler nor Ed. W. Wells had any knowledge or information that this latter prospectus had been or was circulated in England, or had any knowledge or notice of its contents, prior to October, 1893. The only ground for estoppel against Lawler and Wells as connected with the English prospectus which the pleadings present is the allegation of the ownership of the mines in the Seven Stars Gold Mining Company. Not only did Lawler and Wells deny the making of such assertion themselves, or the knowledge on their part of any such assertion having been made in such prospectus, or the knowledge of the circulation of any prospectus containing such assertions, but the evidence presented by the plaintiffs themselves to sustain the above allegation of the complaint was the record book of the Industrial Mining and Guaranty Company, which shows a meeting of October 3, 1892, at which the London prospectus was approved. This prospectus, as fastened in the minute-book of the company, is the same as the prospectus attached to the complaint of the plaintiffs, with the exception of the third paragraph of the body of such prospectus, which reads that "the mines are situated in the Eureka Mining District, Yavapai County, Arizona," instead of "the mines owned by

the company are situated in the Eureka Mining District, Yavapai County, Arizona." This eliminates the English prospectus, and any claim made under it by the plaintiffs, from any further consideration in the case; the only evidence introduced tending to charge Lawler and Wells with any responsibility arising from the English prospectus being evidence (contradicted by Lawler and Wells) tending to charge Lawler with participation in the preparation and knowledge of the contents of the English prospectus being prepared by the officers of the Industrial company between August 31, 1892, and September 3, 1892. As their own evidence establishes the fact that the prospectus then in course of preparation, and afterwards approved by them, did not contain the damaging assertion complained of, it is immaterial whether or not Lawler assisted in the preparation of such prospectus, or had knowledge of its contents; and as they have offered absolutely no evidence that either Lawler or Wells had any knowledge of either the circulation or contents of any other prospectus than this, there could, under no possible view of the case, any liability attach therefrom.

We will next proceed to the consideration of the grounds of estoppel that have been shown in connection with the American prospectus and the accompanying map. It is alleged in the complaint that "On or about the 24th day of September, 1892, the said Lawler, as agent of the said Wells, and acting for both of said defendants, well knowing the condition of the title of the said mines, on his own behalf and on behalf of said Wells assisted and aided the said H. H. Warner to prepare, and cause to be issued, a prospectus reciting, among other things, on the second page of said prospectus, 'This company is formed to acquire, without further expense or liability to subscribers, on October 1st, 1892, as a "going concern," and to provide a working capital to further equip and develop the "Seven Stars" and "Happy Jack" mines, also the locations "Mesa," "Elwood," "Midnight," "Waterfall," and "Boulder" '; that accompanying and a part of said prospectus there was prepared a map or plat of said mining properties by the said Lawler and Wells and the said Warner, upon which map the following representation and statement appears, 'Map of the group of mines belonging to the Seven Stars Gold Mining Co., Yavapai County, Ari-

zona'; that said prospectus, map, and blank applications were distributed throughout the United States by said H. H. Warner and the secretary and treasurer of said company; that copies of said prospectus, map, and blank applications came to plaintiffs herein during the month of October, 1892, and the said plaintiffs, relying upon and believing and being led and induced by representations made and contained in said prospectus and map, severally subscribed for stock in the Seven Stars Gold Mining Co." The only fraud herein charged upon Lawler and Wells in connection with the American prospectus is the recital and representation of the title to said mines and mining property in the said gold company contained in said prospectus, and the omission of any recital tending to show title to the said property in any other person or persons than said company; and the only statement or assertion of the title complained of to the court is the recital on the second page, just quoted: "This company is formed to acquire, on October 1st, 1892, as a 'going concern,' and to provide a working capital, and to further equip and develop, the Seven Stars mines"; and that accompanying said prospectus, as part thereof, was a map, upon which the statement appears, "Map of the group of mines belonging to the Seven Stars Gold Mining Co." The district court held as a conclusion of law "that the purchasers of the capital stock of the Seven Stars Gold Mining Company were not authorized, from reading the prospectus, maps, and blank applications distributed, to so construe the same as to believe or conclude therefrom that the legal title of the properties mentioned therein was vested in the Seven Stars Gold Mining Company." Without determining at this time whether or not the conclusion is authorized in its entirety, it is sufficient for the consideration of the question now presented that the statement in the prospectus, taken by itself, instead of asserting title in the Gold company, is equivalent to the contrary assertion. The object being stated, on September 24th, to acquire on October 1st the mines mentioned, would justify the belief that the title was not then in the company, but would be acquired in the future. Whether the statement placed on the map was calculated to modify this belief would not be material as to Lawler and Wells, because the district court found as a fact (finding No. 19) "that the defendant Lawler, on his

visit to New York, August 30, 1892, saw the original Brodie map hanging on the wall of the office of said companies in New York; that the original Brodie map, of which defendants' map Exhibit A is a true copy, had indorsed thereon the words, to wit, 'Plat of the Hillside and adjoining claims,' and said words were written on the original draft of distributed map Exhibit C, attached to the complaint; that said quoted words were, before distribution, changed to the words, 'Map of the group of mines belonging to the Seven Stars Gold Mining Co.' " This finding is supported by the evidence of A. O. Brodie, the maker of the map, who identified the map in evidence on the trial as a true trace of the map made by him for the Hillside Company, and testified: "This map purports to be a map of the different mines and mining locations, and bears the inscription, 'The Hillside Mines, Yavapai County, Arizona. Prescott, Arizona, August 1, 1892.' These are the letters I put on the original map. I understood then that the mines were being operated by the Hillside Mining Company." Another map was handed to the witness, who said: "That is a trace of the map I made for the Hillside company. I made the original of these two maps. B purports to be a map of the mines and claims involved in this litigation, and bears the inscription, 'The Hillside Mines, Yavapai County, Arizona. Prescott, Arizona, August 1, 1892. Surveyed and drawn by Alexander O. Brodie, Civil Engineer.' I forwarded the original map to H. H. Warner some time during the month of August, 1892. I never drew a map with the words 'Belonging to the Seven Stars Gold Mining Co.' on it, or any words that indicated that the locations belonged to the Seven Stars Gold Mining Company." Abst. Ev., p. 212. Lawler testified: "Warner and Kennard asked me about the mines. I told them I was not to the mine since I sold it to them. Right along the wall a map hung, and there was some very rich ore. They asked me what I thought of the map. The map was up over the ore. I looked at the map. I do not remember what was written on the map. It was up so far I could not read it. The only thing I noticed was the outlines above that looked like workings I made myself. I told them it looked natural.—Q. What, if any, conversation had you about stocking this mine, and selling the stock, and a

prospectus?—A. None whatever.—Q. What, if any, prospectus was shown you?—A. None whatever. I was never in Warner's private office. I never received any prospectus. I first saw one in October, 1893, in Denver, on my way back from the World's Fair. I was in California during the time those were booming around here, the whole year.—Q. When you were in New York, what was shown you to read,—what reading matter in the nature of prospectuses or circulars about those mines?—A. Nothing at all was shown me. I never saw the prospectus of the Seven Stars Gold Mining Co." *Abst. Ev.*, p. 223. The complaint alleges that the prospectus and map were chiefly prepared and mailed by H. H. Warner and the secretary and treasurer of the company, assisted by said Lawler and Wells. Footner, the secretary and treasurer, testified: "The prospectus, map, and blank applications were prepared and printed within three weeks prior to the date printed on them. H. H. Warner supervised the preparation thereof, was the principal in the matter, and the greater part of the documents were framed in accordance with his views. Concerning what information John Lawler had in connection with the preparation of the prospectus, I can only say that in conversation I made him aware of that fact, and that he knew the prospectus was being prepared prior to my interview with him. I never met Ed. W. Wells. Concerning Wells's knowledge of the transaction I am entirely ignorant, excepting that the Industrial Company mailed to Lawler and Wells a number of the prospectuses." H. H. Warner stated in evidence: "My supposition is that Lawler and Wells knew that the prospectuses, copies of which were to be sent out in the quantities that were talked about with Lawler, would be printed, not written. I have no knowledge whether Lawler knew that they were printed or written." The utmost extent to which the evidence in the case goes is to show that Lawler and Wells had knowledge of the preparation and circulation of the prospectus and map. There is no evidence that they knew the statements or representations contained in the prospectus or on the map, or that they occupied such a relation to the preparation or circulation thereof as would impose upon them a duty to know the contents. The bare knowledge, therefore, of such preparation and circulation, will impose no duty nor fasten any liability upon

Lawler and Wells arising from any statement, fraudulent or otherwise, contained in such prospectus or map, without evidence of knowledge on their part of such statements being contained therein. It does not appear from the evidence in the case that the defendants, or either of them, were the authors of any false or fraudulent statements, either in the prospectus or on the map, calculated to mislead or deceive innocent purchasers; or that they, or either of them, had knowledge of any such statements and the falsity thereof, and stood by in silence while innocent purchasers were misled thereby. There is, therefore, no case for the application of the doctrine of equitable estoppel. "For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud." *Henshaw v. Bissell*, 85 U. S. 271, 21 L. Ed. 841.

The disposition of the questions above determined will render unnecessary a consideration of the third and fourth assignments, as they refer simply to the alternate prayer for relief in the complaint, based upon the same allegations of fraud and misrepresentation upon which the error alleged in the first assignment was predicated.

It is next assigned severally, in the succeeding eight assignments of error, that the court erred in rejecting the third, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, and nineteenth findings of fact submitted by the plaintiffs. An examination of these several findings discloses that the third finding, as requested, was not sustained by the evidence in the case, and therefore was properly rejected. The seventh finding related only to evidentiary facts, the refusal to find which by the trial court will not be reviewed by this court. The ninth to nineteenth findings, inclusive, request the finding of a number of evidentiary facts, some of which were elsewhere found by the court, some of which were adversely found on conflicting evidence, some of which were not proven by any evidence appearing in the record, and many of which were not material, but were simply incidental facts which would only amount to evidence from the which the ultimate fact might be deduced. A careful examination of the facts requested to be found in the several findings enumerated and of the evidence as shown by the record has failed to disclose

a refusal by the lower court to find an ultimate or material fact which was supported by uncontradicted evidence, nor has there been in any instance a fact other than, or contradictory to, the facts therein requested, found by the court unsupported by evidence. We do not, therefore, feel authorized to disturb the findings of the lower court in the instances that are herein presented. We think the language of the United States circuit court of appeals (*Snider v. Dobson*, 21 C. C. A. 76, 74 Fed. 757) is applicable to the case now under consideration. The court there says: "In the circuit court the decision turned solely upon an issue of fact. The circuit court decided the issue. We have carefully read and considered all the testimony contained in the record, and have reached the conclusion that there were facts and circumstances developed on the hearing of the case which were fully adequate to warrant the inference that the circuit court appears to have drawn. The issue being one of fact, it would subserve no useful purpose to narrate the evidence in detail. It will suffice to say that the testimony was of such nature that different unprejudiced minds might with equal reason draw different inferences and reach different conclusions. This court, however, has repeatedly declared that where a master or chancellor has considered conflicting evidence, and made a finding thereon, the finding will be taken as presumptively correct, and will be permitted to stand, unless an obvious error has intervened in the application of the law, and some serious and important mistake appears to have been made in the consideration of the evidence. *Warren v. Burt*, 7 C. C. A. 105, 58 Fed. 101; *Paxson v. Brown*, 15 C. C. A. 228, 61 Fed. 874; *Stuart v. Hayden*, 18 C. C. A. 618, 72 Fed. 402; *McKinley v. Williams*, 20 C. C. A. 312, 74 Fed. 94. The same rule has been announced and acted upon by the supreme court of the United States on several occasions. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Evans v. Bank*, 141 U. S. 107, 11 Sup. Ct. 885, 35 L. Ed. 654; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649. We have concluded, therefore, that, inasmuch as the case turned upon an issue of fact, and inasmuch as the evidence was fully adequate to justify the finding made by the trial judge, it should be allowed to stand."

It is argued in the brief of the appellants that the defendants

are estopped to disturb the appearance and representation of ownership of the property by the Seven Stars Gold Mining Company, as evidenced by their occupation and use of such property; but the evidence in the case shows that the Seven Stars Gold Mining Company did not at any time claim or exercise, or attempt to hold or exercise, any possession adverse to Lawler and Wells, or inconsistent with the use, possession, and occupation granted to Cowland by the license contained in the escrow agreement, and to which they would succeed as Cowland's assigns or agents; hence Lawler and Wells had not placed upon them the duty, nor were they given any occasion or necessity, to assert or make known their claim to the title. The evidence discloses that Lawler and Wells did not know, during the time of the occupation and possession of the property by the Seven Stars Gold Mining Company, that the plaintiffs, as purchasers of the stock, were ignorant of the provisions and terms of the escrow agreement, or that they, as such purchasers, had been informed or believed that the Seven Stars company owned the title of the mines, instead of holding and working them under the license of the escrow agreement.

It was also argued that the receipt by Lawler and Wells of the returns from the ore should likewise operate as such estoppel, but the evidence likewise disclosed that such disposition of the receipts from the ore was in accordance with the provisions of the escrow agreement, of which the Industrial Mining and Guaranty Company and the Seven Stars Gold Mining Company were fully cognizant; and Lawler and Wells would not be responsible for any fraud practiced on the stockholders of such company by the officers and the directors, of which they were as ignorant as the stockholders; and as the only dealing of the officers and directors with such stockholders of which Lawler and Wells had any knowledge was consistent with honesty and fairness, and apparently in harmony with the provisions of the escrow agreement under which they were working, and of whose provisions Lawler and Wells supposed the stockholders to be as fully advised as the officers and directors, there would be nothing to put Lawler and Wells upon inquiry. The facts pertinent to these issues have been found by the trial court, and such findings have been based upon evidence contained in the record.

After a patient and careful examination of the record, we are convinced that the lower court correctly held "that the facts proven are not sufficient to constitute a cause of action against John Lawler and Ed. W. Wells, or either of them, or against the property in controversy, or any part thereof." The judgment and decree of the lower court are therefore affirmed.

Street, C. J., and Davis, J., concur.

Sloan, J., having been connected with the case as counsel, took no part in its consideration in this court.

[Criminal No. 142. Filed November 9, 1900.]

[62 Pac. 693.]

JOSEPH TAMBORINO, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW — EVIDENCE—CROSS-EXAMINATION—SCOPE—IMPEACHMENT.—In a prosecution for assault with intent to commit murder a witness for the defense testified that she was present when the quarrel began; that she became frightened and ran out of the room; that there was then a noise like the report of a gun, and then a pistol-shot, but that she did not see defendant have a gun. *Held*, that it was proper to allow the district attorney to ask in cross-examination whether she did not say when she ran into an adjoining place, "Tamborino has shot the butcher," and questions of similar import, as it is proper to bring out everything said by a witness about the transaction, either at the time it happened or afterwards, inconsistent with or tending to contradict her evidence.
2. SAME—SAME—IMPEACHMENT—WHAT STATEMENTS MAY BE.—Proof of contradictory statements upon a material point made by a witness may be introduced in evidence to impeach the witness after he has answered that he does not remember whether he made the contradictory statements or not. He cannot by answering that he has no recollection of having made the former statements imputed to him defeat the right of the impeaching party to prove that he did make such statements.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Herndon & Norris, and J. H. Collins, for Appellant.

"The test as to whether a fact inquired of on cross-examination is collateral is this: Where a witness on cross-examination by the state denies having stated out of court that defendant had done certain things, evidence is inadmissible, as his statements are not evidence against the defendant." *People v. Worthington*, 105 Cal. 689, 38 Pac. 689.

"The test as to whether a witness's statement is material so as to be subject to contradiction by the witnesses of the opposite party is to inquire as to whether it relates to matter which such party would be permitted to give in evidence as part of his case." McKelvy on Evidence, p. 332; *Attorney-General v. Hitchcock*, 1 Exch. 91; *Hildeburn v. Curran*, 65 Pa. St. 63; *Woodward v. Easton*, 118 Mass. 403; *Briggs v. Harvey*, 130 Mass. 186; *Winchell v. Winchell*, 100 N. Y. 159, 2 N. E. 897; *State v. Patterson*, 74 N. C. 157; *Powers v. Leach*, 26 Vt. 270; *People v. Knapp*, 42 Mich. 267, 36 Am. Rep. 138, and note, 3 N. W. 927; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188.

The impeachment of the credit of a witness by showing former inconsistent statements "is only allowable when the statement sought to be contradicted relates to a material part of the case." *Rainey v. State*, 20 Tex. App. 473; *Lane v. Bryant*, 6 Gray, 246; *Drake v. State*, 29 Tex. App. 265, 15 S. W. 725; *Holms v. Anderson*, 18 Barb. 420; *Seller v. Jenkins*, 97 Ind. 435; *Dunn v. Dunn*, 11 Mich. 284; *Fisher v. Hood*, 14 Mich. 189; *Leavitt v. Stansell*, 44 Mich. 424, 6 N. W. 855; *Howard v. Patrick*, 43 Mich. 121, 5 N. W. 84; *Hamilton v. People*, 46 Mich. 186, 9 N. W. 247; *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221; *McDonald v. McDonald*, 67 Mich. 122, 34 N. W. 276; *People v. Morrigan*, 29 Mich. 4.

"A witness cannot be impeached by irrelevant statements brought out on cross-examination." *United States v. White*, 5 Cranch C. C. 38, Fed. Cas. No. 16,675; *Bell v. Woodman*, 60 Me. 465; *State v. Burner*, 64 Me. 267; *Carpenter v. Ward*, 30 N. Y. 243.

"But the statement which it is intended to contradict must involve a fact in evidence. If confined to opinion when opinion is not at issue, or to other irrelevant matter, the cross-examining party is bound by the answer." *McNeil v. Arnold*,

22 Ark. 477; *McKern v. Calvert*, 59 Mo. 244; *State v. Reid*, 60 Me. 355; *Brackett v. Weeks*, 43 Me. 291; *Sumner v. Crawford*, 45 N. H. 416.

C. F. Ainsworth, Attorney-General, for Respondent.

STREET, C. J.—The appellant, Joseph Tamborino, was tried in the district court of Yavapai County for the crime of "assault with intent to commit murder," alleged to have been committed on the eighth day of May, 1899, upon the person of one Ed. A. Tovrea, and was found guilty of "assault with a deadly weapon." The evidence for the prosecution tended to prove: That on the night of the 8th of May, 1899, the prosecuting witness, Tovrea, was sitting in a wine or card room in the rear of the Red Light Saloon, in the town of Jerome, with Lillie Lindsley and Rose Worth. That the Red Light Saloon was kept by Stella Carroll; and that the appellant, Tamborino, about 11:30 o'clock at night, went into the barroom of the saloon, and, being very friendly with the proprietress, Stella Carroll, she and he, after having first obtained permission of the Tovrea party, passed from the barroom into the room where the Tovrea party was sitting, and joined them in drinks. That, after the lapse of half an hour or such a matter, Tamborino, without any apparent provocation, pulled his gun from his bosom or waist, and, with an oath, said he would kill Tovrea. That Tovrea, to preserve his life, quickly sprang to Tamborino, and grappled with him, and a struggle ensued for the possession of the gun. In the struggle the gun was discharged, the charge hitting no one, but passing into the floor. When Tovrea and Tamborino first clinched, they fell against a mirror in the front of an upright bed and broke it. The girls ran from the room. An officer ran in and separated the men, taking the gun from the hands of both of them. The evidence upon the part of the defendant was not different from that of the prosecution up to the time of the beginning of the struggle between the two men. The defendant's evidence tended to show that the struggle was commenced by Tovrea, and that Tamborino pulled his gun after Tovrea had clinched him, thrown him down, and was chewing his finger, and that Tamborino pulled the gun solely in self-defense. The evidence offered by the prosecu-

tion so strongly tended to prove the truth of the charge in the indictment that the fact whether the combat was commenced as detailed by the prosecution was a vital point in the case. Stella Carroll, with whom the appellant was on very friendly terms, gave evidence in behalf of the defendant, and said: "Tamborino got up, and walked across the room, and picked up a match from the dresser, and walked back to his chair and sat down. By and by he got up to leave the room, and just as he raised up from his chair—sitting in a rocking-chair—just as he raised up, he made a motion like to pull his vest down, about to brush his coat; and with that the butcher [Tovrea], from where he sat, sprang at him, and they came together; and there was a folding-bed set cater-corner, and the crash the folding-bed made frightened me,—the three of us there,—and we all hollered. . . . It sounded like a gun, the crash of that folding-bed. . . . When that noise was made, I hollered, 'Oh, my God! Don't.' . . . We all started to run. Just as we ran out of the room, we heard a pistol-shot. . . . I ran up the street, right through the saloon, into the restaurant. . . . I did n't see a gun. . . . I was in the room, about ten feet from Tamborino. . . . The two men came together at the chair where Tamborino was sitting. . . . At the time Tovrea made the lunge for Tamborino, I did n't see Tamborino have a gun. . . . At no time did I see a gun." Stella Carroll was cross-examined by the district attorney, and asked, over the objection of the defendant, the question: "At that time and place, when you ran in there,—the restaurant,—did n't you exclaim, in a crying mood, that 'Joe Tamborino has shot the butcher'?" Again: "Did n't you say that 'Joe has killed the butcher'?"—to both of which questions she replied: "I could n't say positively whether I said that or not. I was excited. I don't remember whether I did or not. . . . I says, 'Oh, my God! Something has occurred,' or 'Something has happened,' or something like that. That's all I recollect." Afterwards the district attorney called to the stand witnesses who testified that Stella Carroll, when she went through the saloon, was crying, and said: "Oh, Joe Tamborino has killed the butcher," and "Joe Tamborino has shot the butcher." The only questions raised on this appeal by the defendant relate to such cross-examination and the admission of this impeaching testimony. The defendant assigns as error—First, that the court erred in permitting the

question to be put to Stella Carroll on cross-examination as to whether she had made this statement in the Elite Saloon; and, second, that the court erred in permitting Emmett Ewing and Lillie Lindsley to testify as to Stella Carroll having made this statement in the Elite Saloon.

There could have been no error in permitting the district attorney to cross-examine Stella Carroll as to all that she said about the transaction, either at the time it happened or afterwards, inconsistent with or tending to contradict her evidence. Her evidence tended to lead to the conclusion that she had seen nothing more than she narrated on her main examination, and it would be the right of the prosecution to examine her, if she did not make statements which would show she had seen and heard more than she related. It would be his right to test that question, and obtain from her on cross-examination all that she saw and heard. If the district attorney could be permitted to rebut the statements of Stella Carroll that she had not said the things imputed to her, it then would be his duty to lay the ground for an impeachment by such cross-examination. So the whole question comes as to whether those statements were material or immaterial. If such statements were immaterial, the district attorney would be bound by the answers made by the witness on cross-examination. If they were material to the issue being tried, he would have a right to show that she had made such statements, after she had either denied making them, or had said that she had no recollection of making them, and did not remember. Proof of contradictory statements made by a witness may be introduced in evidence to impeach the witness after he has answered that he does not remember whether he made the contradictory statements or not. He cannot, by answering that he has no recollection of having made the former statements imputed to him, defeat the right of the impeaching party to prove that he did make such statements. It seems to this court that the impeaching evidence and the expression, "Tamborino has shot the butcher," or "Tamborino has killed the butcher," taken in connection with the evidence which the witness Stella Carroll gave on her direct examination, and with her hasty departure from the room at the outbreak of the difficulty, makes it quite material. The question to be solved was not whether in fact Tamborino had shot Tovrea, nor whether in fact Tovrea had shot Tamborino, nor whether,

indeed, either of them had been shot, but who had commenced the affray, or had it been commenced by Tamborino in such a way as to make the verdict of the jury of "assault with a deadly weapon" a correct verdict. Whether Tamborino had drawn his gun at the time the conflict commenced in such a way as to become the aggressor was an important inquiry. Stella Carroll was called as a witness for the defendant, was friendly to the defendant, and her evidence tended to show that Tamborino was not the aggressor. Witnesses for the prosecution testified that the affair was commenced by Tamborino drawing his gun and threatening to kill Tovrea; whereupon Stella Carroll and the other girls ran out of the room. As they were going out, a shot was fired. If, almost immediately afterwards, Stella Carroll declared that "Tamborino has shot the butcher," it is a matter of fair argument that she based that statement upon what she saw and heard in the room before she left,—that which the other witnesses saw and heard,—the pulling of the gun by Tamborino, and the threat by him, when he pulled his gun, that he was going to kill Tovrea. Under that view of the evidence it seems to be not an immaterial question and answer by which the district attorney would be bound, but appears to be a material question to the issue in the case as to whether Tamborino made an assault on Tovrea with a deadly weapon. Had Stella Carroll remained in the room during the struggle, and been in the room at the time the shot was fired, and seen the struggle of the two men for the pistol, and then made the declaration, after the affray was over, under a misapprehension of the result of the shot, that Tamborino had shot the butcher, such a statement might have been immaterial, as not tending to show who had commenced the affray; but her statement of the supposed result of the shot, which she did not see fired, but only heard the report of while she was running from the scene, might fairly be examined into, tending to contradict her statements when she says she did not see a gun, that she saw nothing in Tamborino's hands, and that Tovrea commenced the affair. The judgment of the district court is affirmed.

Davis, J., concurs.

Doan, J., dissents.

[Civil No. 701. Filed November 9, 1900.]

[62 Pac. 691.]

**HENRY GOLDWATER, Defendant and Appellant, v.
MARY BOWEN, Plaintiff and Appellee.**

1. **PLEADING—PRACTICE—NO DEMURRER TO ANSWER—JUDGMENT ON PLEADINGS—WHEN GRANTED—MILES v. MCCALLAN, 1 ARIZ. 491, 3 PAC. 610, FOLLOWED.**—There is no express provision in the statutes for a demurrer to the answer, and judgment may be rendered upon the pleadings when the answer does not deny any of the material allegations of the complaint, or does not set up new matter constituting a defense. If the answer denies in specific terms the material allegations of the complaint, or if it sets up new matter constituting a defense, judgment upon the pleadings may not then be rendered.
2. **SAME—ANSWER—SUFFICIENCY.**—Plaintiff sued for interest due on a contract in writing, whereby plaintiff conveyed certain property to defendant, defendant to pay purchase price within four years and certain interest monthly until the purchase price was paid. Defendant answered that the instrument did not contain the whole of the agreement and set up the complete contract, and, second, that the contract was an option, which he had exercised and surrendered. *Held*, this answer raised an issue of fact to be tried, and therefore it was erroneous to render judgment on the pleadings for plaintiff.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion of the court.

Herndon & Norris, for Appellant.

Andrews & Ling, and H. D. Stocker, for Appellee.

STREET, C. J.—The parties to this action on the twentieth day of March, 1895, entered into an agreement in writing with each other, wherein Mary Bowen, appellee, agreed to convey lots 11 and 13 in block 2 of the city of Prescott to the appellant for the sum of four thousand dollars. For that purpose appellee made and executed a deed therefor to Henry Goldwater, the appellant, and delivered the same in escrow

to the Prescott National Bank, accompanied by an escrow agreement signed by the parties, in which it was agreed that on or before four years from the date thereof the appellant, Goldwater, will pay the appellee, Bowen, the full sum of four thousand dollars, with interest thereon at the rate of forty dollars per month, payable monthly, until the full sum of four thousand dollars is paid. Appellant therein agreed to keep the buildings and improvements on said lots insured at his own expense for the benefit of the appellee, Bowen, and to pay all taxes of every kind assessed against the property during the life of the agreement. Goldwater went into possession of the premises, and paid the interest specified in the agreement up to the first day of August, 1897. After that he made default in the payment of interest, and this action was brought by Bowen to recover interest for the months of August, September, October, November, and December, in the sum of two hundred dollars. Defendant answered, and, without denying the execution of the deed or the escrow agreement, alleged that said agreement to purchase was but an option given to him for the purchase of said lots, and he was at liberty to accept or reject it at any time within four years; and that the forty dollars per month interest was but a consideration for rent so long as he should occupy the premises. Defendant further alleged that on or about the first day of August, 1897, he, having decided not to purchase the property, exercised his option, and notified plaintiff that he would not purchase the property, and that he did surrender the possession of the same to the plaintiff, Bowen; since which time he has not occupied the premises, nor had any possession or right of possession to the same, but that the same was wholly surrendered to the plaintiff. Plaintiff moved for judgment on the pleadings, which motion was heard by the court on May 28, 1898, and taken under advisement, and leave granted the defendant to amend his answer. The further hearing of the motion and the cause was continued from time to time until September 27, 1898, at which time it was continued for the term, and the cause was set for trial as the first civil jury case at the November term, 1898. On December 2, 1898, the case was tried by the court sitting without a jury, at which time, before the trial commenced, the defendant, by leave of the court, filed an amended answer, and again plaintiff moved

for judgment on the pleadings. Witnesses were sworn and examined, and, the trial being concluded, the cause was submitted to the court. On January 5, 1899, the following minute entry was made, to wit: "Plaintiff's motion for judgment upon the pleadings having been heretofore argued and submitted, and the court, having fully considered the same, and being sufficiently advised in the premises, sustains the motion, and orders that judgment be entered for plaintiff accordingly; to which ruling of the court the defendant in open court duly excepts,"—whereupon judgment was rendered for the plaintiff against the defendant for the sum of two hundred dollars, together with the sum of \$10.31 interest due on said sum, and thereupon the defendant appealed to this court.

There is but one question raised for the consideration of this court, and that is whether the district court committed error in granting judgment upon the pleadings, or whether there was sufficient matter in the defendant's answer to constitute any defense to the complaint. Judgment upon the pleadings is a practice recognized by the courts of Arizona. *Miles v. McCallan*, 1 Ariz. 491, 3 Pac. 610. There is no express provision in our statute for a demurrer to the answer, and judgment may be rendered upon the pleadings when the answer does not deny any of the material allegations of the complaint, or does not set up new matter constituting a defense. If the answer denies in specific terms the material allegations of the complaint, or if it sets up new matter constituting a defense, judgment upon the pleadings may not then be rendered. What is not denied must be taken as admitted. The defendant in this action did not deny any of the allegations of the complaint, but undertook to allege matters in defense, which, in effect, were: First, that the instrument in writing accompanying the deed in escrow did not contain the whole of the agreement; and second, that the contract was an option, which he had exercised and surrendered. Counsel, both for the appellant and appellee, have spent much time on their briefs to demonstrate their views as to whether the agreement as signed by the parties could be affected by a parol agreement or not. We do not feel called upon to settle that discussion. We only have to determine whether the answer raised an issue. The language of the answer was: "It was expressly understood and agreed that the writing,

when signed, should not amount to anything more than an option on the part of defendant to purchase the property at any time during the four years; or, in case he should decide not to purchase the same, to yield the possession, and cease from all liability." It further states that the defendant notified the plaintiff that he would not use his option to buy the property, but that he would surrender possession, and that he did surrender possession, and that he had not exercised any authority or made any claim of possession to the property since he had so notified the plaintiff. The answer raised an issue of fact to be tried. The judgment of the district court is reversed, and defendant granted a new trial.

Davis, J., and Doan, J., concur.

MEMORANDUM DECISIONS.

[Civil No. 712.]

C. P. LEITCH, Appellant, v. CHARLES H. HOLMES,
Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. F. M. Doan, Judge.

L. H. Chalmers, for Appellant.

Joseph H. Kibbey, for Appellee.

January 16, 1900. Dismissed.

[Civil No. 717.]

H. C. DAY et al., Appellants, v. FRANK DYSART, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge.

Wiley E. Jones, and Baker & Bennett, for Appellants.

C. W. Wright, and William Lovell, for Appellee.

January 16, 1900. Affirmed.

[Criminal No. 138.]

ESTABIAN RODRIGUES, Appellant, v. TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge.

E. J. Edwards, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

January 18, 1900. Dismissed.

[Criminal No. 139.]

EMETERIO POSADO, Appellant, v. TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the Second Judicial
District in and for the County of Graham. F. M. Doan,
Judge.

E. J. Edwards, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

January 18, 1900. Dismissed.

[Criminal No. 145.]

RAMON PINERO, Appellant, v. THE TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the Second Judicial
District in and for the County of Graham. F. M. Doan,
Judge.

F. B. Laine, for Appellant.

C. F. Ainsworth, Attorney-General, and Wiley E. Jones,
District Attorney, for Respondent.

January 19, 1900. Affirmed.

[Civil No. 714.]

A. A. LONG et al., Appellants, v. COMMON COUNCIL OF
THE CITY OF PHCENIX, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
Judge.

C. F. Ainsworth, for Appellants.

Hamilton & Armstrong, and L. H. Chalmers, Attorneys for
Appellee.

January 19, 1900. Dismissed

[Civil No. 723.]

MARK D. ROCHFORD et al., Appellants, v. MORGAN J. JONES et al., Appellees.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Mohave. R. E. Sloan, Judge.

J. M. Murphy, and W. E. F. Deal, for Appellants.

C. N. Sterry, and E. E. Ellinwood, for Appellees.

March 27, 1900. Dismissed.

[Criminal No. 136.]

JUAN SOTO et al., Defendants and Appellants, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge.

S. A. D. Upton, and George W. Swain, for Appellants.

C. F. Ainsworth, Attorney-General, for Respondent.

March 28, 1900.

PER CURIAM.—The appellants, Juan Soto and Louis Valenzuela were, at the November, 1898, term of the district court in and for Cochise County, indicted, tried, convicted, and sentenced to life imprisonment for the crime of murder in the first degree. The transcript in this case consists of the indictment, minute entries of the trial, the instructions given by the court, and the judgment. There is no bill of exceptions or statement of facts, nor have any briefs been filed in the case. We have examined the record as presented, and find no error therein, and the judgment is therefore affirmed.

[Civil No. 741.]

THE COMMON COUNCIL OF THE CITY OF PHOENIX, Appellant, v. THE TERRITORY OF ARIZONA, on Complaint of C. F. Ainsworth, Attorney-General of said Territory, Appellee.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

G. P. Bullard, for Appellant.

C. F. Ainsworth, Attorney-General, for Appellee.

November 8, 1900. Dismissed.

[Civil No. 702.]

L. H. ORME, Sheriff, Appellant, v. THE FARMERS AND MERCHANTS' BANK, Appellee.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

C. W. Wright, and John W. Wright, for Appellant.

W. J. Kingsbury, for Appellee.

November 9, 1900.

PER CURIAM.—This was an action in claim and delivery, brought in the district court of Maricopa County, on October 26, 1895, by the Farmers and Merchants' Bank against L. H. Orme, to recover the possession of a stock of hardware and other chattels, held by the said Orme, as sheriff, under a writ of attachment issued out of said district court in the suit of the John Deere Plow Company against the Arizona Hardware Company, to recover a debt. The Arizona Hardware Company was a domestic corporation, doing business at Tempe, Arizona, and on October 25, 1895, was indebted to the Farmers and Merchants' Bank on an overdue note in the sum of seven hundred and fifty dollars, with interest thereon, and to the said John Deere Plow Company in the sum of \$5,826.89, with interest. On that day the latter company brought its suit, and caused the writ of attachment to be placed in the hands of the appellant for service. On the same day, and before the writ was levied by the sheriff, Henry E. Kemp, as president of the Arizona Hardware Company, executed a mortgage to the Farmers and Merchants' Bank upon the

stock and chattels of the company's Tempe store, valued at six thousand dollars, and immediately turned over and delivered the possession of said property to the bank, to control and manage the business until there should be obtained from sales of goods enough money to pay off and discharge its aforesaid note of seven hundred and fifty dollars, with interest, and attorney's fees of one hundred dollars. The appellee entered into, and continued to hold, the actual possession of said mortgaged property until dispossessed by the appellant, who took forcible charge of it under the writ of attachment several hours later in the day. Thereupon the appellee commenced its action and obtained possession from the sheriff by virtue of its writ in claim and delivery. The cause was tried before the district court, sitting without a jury. That court held the possession of the appellant to have been wrongful, and adjudged that the appellee recover the property, with costs. This case was previously before the supreme court at its January term, 1898. The material facts are the same, and the record presents to us no new or different propositions from those which were involved in the former appeal. These questions were fully considered and passed upon in *Farmers etc. Bank v. Orme*, 5 Ariz. 304, 52 Pac. 473, and we see no reason for changing the views which are therein expressed. We find no error, and the judgment of the lower court is affirmed.

[Civil No. 735.]

H. I. LATHAM, Administrator of the Estate of Martin House, Deceased, Appellant, v. **E. F. WOODDELL**, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

Thomas D. Bennett, for Appellant.

Joseph H. Kibbey, for Appellee.

November 9, 1900. Dismissed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1901.

[Civil No. 710. Filed January 28, 1901.]

[63 Pac. 713.]

**WILLIAM M. BILLUPS, Plaintiff and Appellant, v. THE
UTAH CANAL ENLARGEMENT AND EXTENSION COMPANY, Defendant and Appellee.**

- 1. APPEAL AND ERROR—RECORD—CONTENTS—EVIDENCE—MUST BE INCORPORATED BEFORE ERRORS DEPENDENT THEREON WILL BE REVIEWED.**—On appeal the court will not review errors which involve a consideration of the facts disclosed by the evidence, unless the evidence is incorporated in the record.
- 2. WATER AND WATER-RIGHTS—CANAL COMPANIES—NEGLIGENCE—PLEADINGS—ISSUES—INSTRUCTIONS TO JURY.**—Where the complaint alleged that plaintiff's land was flooded and damaged by reason of the negligence of defendant in the operation of its canal, and the answer denied the negligence, but contained no allegation of contributory negligence, a charge to the jury that if plaintiff's horses and cattle tramped down the borders of the canal and caused the break, or if any direct agency of the plaintiff caused the break, he could not recover, is not erroneous, upon the theory that it is an instruction to find for the defendant because of plaintiff's contributory negligence, as under the pleadings, the evidence not being in the record, any evidence tending to show that the break was by the direct acts or agency of plaintiff, and such acts were of such nature or committed under such circumstances as not to import negligence on the part of the defendant, in not being aware of them or anticipating their results, would have been competent and would have fully justified the instruction.
- 3. SAME—SAME—SAME—DAMAGES—PLEADINGS—ISSUES—SCOPE OF EVIDENCE—INSTRUCTIONS TO JURY.**—Where the complaint alleged that plaintiff's land was flooded and damaged by reason of negligence of defendant in the operation of its canal, and the answer denied every material allegation of the complaint, the question of damage

was in issue, and evidence would have been competent to show that the flooding was a benefit instead of a damage. The evidence not having been incorporated in the record, it must be assumed that evidence was given which rendered proper an instruction that plaintiff could not recover if his lands were benefited instead of damaged by the flood.

4. COSTS—LARGELY DISCRETIONARY WITH THE TRIAL COURT—COURT REPORTER'S PER DIEM—RULES OF COURT—PRESUMPTIONS—REGULARITY OF PROCEEDINGS—PARS. 895, 896, 902, 912, REV. STATS. ARIZ. 1887, CITED.—The statutes, *supra*, leave the determination and disposition of the costs largely in the discretion of the trial court. The rules of the trial court relative to the per diem of the court reporter not being incorporated in the record, and the record showing that the court refused on motion to strike out an item in the cost-bill for the compensation of the court reporter, the presumption in favor of the regularity of procedure must prevail, and it will be assumed that the trial court acted in accordance with its rules.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

A. J. Daggs, for Appellant.

Baker & Bennett, for Appellee.

Instructions will not be reviewed where the court has not the evidence upon which they were based before it. *People v. Baker*, 1 Cal. 405; *White v. Abernathy*, 3 Cal. 426; *Nelson v. Mitchell*, 10 Cal. 93; *Beckman v. McKay*, 14 Cal. 253; *People v. Donohue*, 45 Cal. 322; *People v. Whitney*, 53 Cal. 429; *Hinkle v. San Francisco etc. R. R.*, 55 Cal. 632; *People v. Strong*, 46 Cal. 304; *Harris v. Barnhart*, 97 Cal. 549, 32 Pac. 589; *Ah Twine Gooslin v. Letson*, 58 Kan. 814, 49 Pac. 157; *Territory v. Neligh*, 2 Ariz. 69, 10 Pac. 367.

DOAN, J.—The appellant, as plaintiff, brought an action in the district court of Maricopa County against the appellee, as defendant, to recover damage for the injury caused to plaintiff's (appellant's) land, crops, and stock by the breaking of the canal owned and operated by the appellee, and the consequent flooding of the plaintiff's premises. The complaint alleged that "the defendant, while operating and

carrying water in the said canal, grossly neglected to keep the banks of said canal in proper repair to carry water therein, and did manage said canal and water therein in such a grossly careless and negligent manner that on December 10, 1898, the water carried in said canal by defendant, at a point where said canal crosses plaintiff's land, overflowed, washed down, and destroyed the bank, and flowed out and inundated and overflowed the land of the plaintiff, to his great damage"; and, for a second cause of action, that "the defendant company, after the said canal had broken its banks and flooded plaintiff's property, on December 10th, failed and refused to place the said banks of said canal in proper repair; and while said banks were in such insufficient and poor repair, and while the defendant well knew the bank or break in said ditch was improperly and poorly and imperfectly constructed, and insufficient to hold the water usually carried therein, the defendant, on December 18, 1898, turned water in said ditch in such a grossly careless and negligent manner that the gap where the bank of said canal had previously broken on plaintiff's land again gave way and broke, and the lands of plaintiff were again overflowed, inundated, and damaged." The defendant demurred to the complaint, and entered a general denial of each and every allegation in said complaint, and each cause of action therein contained. The case was tried to a jury, and the jury, after having been instructed by the court, brought in a verdict in favor of the defendant; whereupon the court rendered judgment against the plaintiff for costs, including in said costs an item of fifty dollars for stenographer's fees. The motion to retax costs by deducting from the defendant's cost-bill the said item of fifty dollars was denied. From the judgment in the case and the order denying the motion for a new trial the plaintiff appeals, and assigns as error—First, the refusal of the court to give six several instructions requested by plaintiff; second, the giving of two instructions for the defendant which were excepted to by plaintiff; and third, the allowance in the judgment of the item of fifty dollars paid by defendant to the court reporter for his per diem for taking notes of the testimony in the trial, and the refusal of the court to strike the same from the defendant's cost-bill on motion.

The appellant has not incorporated in the record any of the

evidence in the case, but has simply said that the plaintiff submitted evidence, both oral and written, to sustain the issues on his part, and the defendant submitted evidence, both oral and written, to sustain the issues on its part. The record shows that eleven witnesses testified on one side and sixteen on the other, and that the examination of the witnesses occupied four days.

On the question presented in the first assignment, the courts have held, without exception, in considering the refusal of a trial court to give instructions requested by an appellant, that, unless the testimony upon which the instructions are predicated is before the appellate court, it is impossible to say whether or not the lower court erred in the refusal, and the court will therefore not review errors claimed to have been committed which involve a consideration of the facts as they may have been disclosed by the evidence. *Ah Twine Gooslin v. Letson*, 58 Kan. 814, 49 Pac. 157; *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589. The well-settled rule of the courts in this respect is very happily stated in *Frost v. Creamery Co.*, 102 Cal. 525, 36 Pac. 929. The court in that case said: "Defendant appeals from the judgment, and brings up the judgment-roll and a bill of exceptions, which merely show the instructions given and refused, and the exceptions thereto. Nothing else appears. A reversal is asked solely upon alleged errors in giving and refusing instructions. In such a case a judgment will rarely be reversed. All intendments are in favor of sustaining it. It does not appear what evidence was or was not introduced, and we cannot tell upon what theory the case was tried. Under these circumstances, the alleged error of the court below, in refusing certain instructions asked by appellant, cannot be considered as a ground for reversal. *Nelson v. Lemmon*, 10 Cal. 49; *White v. Abernathy*, 3 Cal. 426; *Carpenter v. Ewing*, 76 Cal. 487, 18 Pac. 432, and cases there cited. The same may be said of instructions given, unless they 'would have been erroneous under any conceivable state of facts.' *Carpenter v. Ewing, supra.*"

It is next claimed that two instructions given were erroneous. Appellant says: "The court erred in giving instruction No. 6 for defendant, for the reason that this instruction tells the jury that, if they believe from the evidence . . . at the plaintiff was guilty of contributory negligence, they must find

for the defendant, when there was no issue of contributory negligence made by the pleading, and contributory negligence, having not been pleaded by defendant, could not be proved under a general denial, and this instruction is not responsive to the issues or pleadings." The instruction, as given, reads: "If the jury believe from the evidence that the horses and cattle under control of the plaintiff, and being pastured upon his premises, went upon the defendant's ditch, and tramped down the borders, and caused the break whereby plaintiff's premises were flooded and damaged, or if you believe from the evidence that the break was caused by the direct agency of the plaintiff in any way, whereby his premises were flooded and damaged, he cannot recover in this case, and you should find for the defendant." Contributory negligence is not mentioned in the instruction, nor is it necessarily contemplated. Contributory negligence, when pleaded and proven, generally presupposes negligence on the part of the defendant, and is presented in the way of confession and avoidance; but in this case the negligence charged in the complaint is denied in the answer, and there is no averment on the part of the defendant that the plaintiff was guilty of contributory negligence.

The complaint alleged that the plaintiff was damaged "by reason of the grossly careless and negligent manner of the management of the said ditch, and the grossly careless and negligent manner of carrying water therein." The answer denied each and every allegation in the complaint. Under that answer, any fact, or state of facts, that tended to disprove negligence on the part of the defendant, could be put in evidence. Any evidence tending to show that the break was caused by the direct act or agency of the plaintiff, in taking out water for irrigation or for other purposes, or that after the first break was mended the plaintiff turned into the pasture where it had occurred a large band of cattle or horses, that tramped down the fresh earth where the bank was repaired, and that these or other possible acts were not known by the company, and were of such nature, or committed under such circumstances, as not to import negligence on the part of the defendant in not being aware of them or anticipating their results, would have been competent under the pleadings, and would have fully justified the instruction.

The next assignment alleges that "the court erred in giving instruction No. 7 for defendant, over objection of plaintiff, . . . because it is not responsive to the pleadings or the issues in the case." The instruction reads: "If the jury believe from the evidence that the flooding of the plaintiff's land by reason of the break in defendant's canal was a benefit to said land or to the plaintiff, and that such benefit was equal to or greater than the damage, if any, thereby sustained by plaintiff, your verdict should be for the defendant." The denial in the answer put in issue not only the alleged negligence of the defendant in causing the damage (if any) alleged in the complaint, but also put in issue the fact of the damages having been sustained. The instruction as given was most certainly responsive to the issue. If there was any evidence that the lands and crops were benefited by the irrigation, rather than, or more than, damaged, that evidence would render the instruction perfectly proper, and, as it can be readily conceived that such evidence may have been offered, the instruction in question comes under the rule above cited.

It is next urged by the appellant that the court erred in allowing the judgment for the item of fifty dollars paid by defendant to the court reporter, and refusing, on motion, to retax the cost-bill by striking the said item therefrom. Our statutes provide (Rev. Stats. par. 895): "The successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may be otherwise provided by law." Paragraph 896: "On all motions the court may give or refuse costs at its discretion, except where it is otherwise provided by law." Paragraph 902: "The court may for good cause, to be stated on the record, adjudge the costs otherwise than as provided in the preceding sections of this act." Paragraph 912: "The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court a memorandum of the items of the costs to which he is entitled. He may include in the costs all the necessary disbursements in the action or proceeding, including the fees of officers allowed. . . ." From these provisions it will appear that the determination and disposition of the costs in any given case are largely in the discretion of the trial court.

Counsel for the appellee contend on this subject that "the

charge is for the regular per diem allowed by the rules of the court." The rules of the trial court relative to the per diem of the court reporter, from which we could determine this fact, have not been brought up; but the record discloses that the court's attention was directed to this item in the cost bill, and that the court denied a motion to have the item stricken out. Upon the presumption that exists in favor of the regularity of the procedure of courts of general jurisdiction, we must, in the absence of any showing to the contrary, presume that in the allowance of the item aforesaid, and denying the motion to retax and strike out the same, the court was acting in accordance with its rules, and therefore its action will not be disturbed by this court. No other errors having been assigned, and none appearing in the record, the judgment of the district court is affirmed.

Davis, J., and Sloan, J., concur.

[Civil No. 705. Filed January 30, 1901.]

[68 Pac. 757.]

CORA BRILL, as Administratrix of the Estate of James Rourke, Deceased, et al., Defendants and Appellants, v. WILLIAM CHRISTY, Plaintiff and Appellee.

1. LIVE-STOCK—TRANSFER—BILL OF SALE—VALIDITY OF—EVIDENCE—ACT No. 6, SEC. 61, LAWS OF 1897, CONSTRUED.—Section 61, *supra*, provides that cattle running at large upon the range may be transferred by a sale and delivery of the marks and brands of such animals. It does not, however, prohibit the sale or transfer of live-stock in any other manner. *Held*, that the owner of an undivided interest in cattle running at large upon the range can transfer his interest the same as any other personal property, without delivery, by a bill of sale properly executed, acknowledged, and recorded.
2. SAME—MARKS AND BRANDS—REGISTRATION—CERTIFICATE—EVIDENCE OF OWNERSHIP OF BRAND BUT NOT OF CATTLE—ACT No. 6, SEC. 50, LAWS OF 1897, CONSTRUED.—The statute, *supra*, makes the certificate of the registration of a brand on cattle competent evidence of registration of such brand and *prima facie* evidence of ownership. In an action against an administratrix to recover an un-

divided interest in cattle on the range, the title to the brand not being in controversy, a certificate issued pursuant to the provisions of statute, *supra*, is not competent evidence for the purpose of showing that the title to the cattle is in the party in whose name the brand is recorded.



APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellants.

C. F. Ainsworth, for Appellee.

DOAN, J.—An action was brought in the district court of Maricopa County by the appellee, as plaintiff, to recover the undivided one fourth of a band of cattle branded thus, R, and for an accounting by appellants (the defendants) of their dealings with said cattle, and for a division thereof, and the delivery to the appellee of his alleged undivided one-fourth interest therein. The complaint alleged that one William Roarke was the owner of an undivided one-fourth interest in a certain band of cattle, and that James Roarke, since deceased, was the owner of the remaining three-fourths interest; that William Roarke conveyed his undivided one-fourth interest to William James Roarke, who in turn conveyed the same to the appellee herein; that, after the death of James Roarke, Cora Brill qualified as administratrix of the estate of the deceased, took possession of the entire band of cattle, and claimed title thereto to be in the estate of the said James Roarke, deceased. The answer of the appellants admitted the possession of the cattle to be in the appellant Cora Brill, administratrix; denied the ownership of the appellee, and his right to possession, of the one-fourth interest in said cattle; and alleged the estate of James Roarke, deceased, to be the owner of, and the appellant Cora Brill, as administratrix of the said estate, to be entitled to the possession of the entire band of cattle. Upon the trial of the cause the plaintiff, to sustain his title, introduced evidence to prove title in William Roarke to the one fourth of the cattle in question, and offered in evidence an instrument in writing executed by William Roarke to Wil-

liam James Roarke, acknowledged before a notary public in California, and recorded in Maricopa and Yavapai counties, Arizona, conveying to said William James Roarke an undivided one-fourth part of a certain band of cattle, together with their offspring, which band of cattle is known by the following brand, , which said brand is duly recorded on the records of Yavapai County, and which said band of cattle was lately in the custody and charge of James Roarke, who died on February 26, 1898, at Phoenix; also one undivided one fourth of a certain band of horses, which said band was known by the same brand above set forth, and was likewise in the care and custody of said James Roarke at the time of his decease. Plaintiff also offered in evidence a bill of sale executed by William James Roarke to William Christy, the appellee herein, acknowledged before a notary public in Phoenix, Arizona, and recorded in Maricopa County, Arizona, selling and conveying to the said William Christy "an undivided one-fourth interest in and to that certain band of cattle and horses known as the Roarke cattle and horses, and branded as follows, to wit, , on the left hip of both horses and cattle." The case was tried to a jury. The counsel for the respective parties stipulated in open court that the jury return a special verdict upon the question submitted to them, "Is the plaintiff, William Christy, the owner of the undivided one-fourth interest in the cattle described in the complaint?" The jury returned a verdict saying, "We, the jury, in answer to the question submitted to us, 'Is the plaintiff, William Christy, the owner of the undivided one-fourth interest in the cattle described in the complaint?' say, 'Yes.' " The court thereupon gave judgment to the effect that the appellee, William Christy, was the owner of the undivided one-fourth interest in the cattle, and ordered an accounting, and a division thereof, and the delivery of the said one fourth, from which judgment and the denial of a motion for a new trial the defendants appeal, and assign as error: First, the court erred in admitting in evidence plaintiff's Exhibits A and B, the conveyances aforementioned; second, the court erred in rejecting defendants' Exhibit No. 1. The only question presented in the case is the admissibility in evidence of the three exhibits offered.

It is conceded that the band of cattle in question were run-

ning at large upon the range in Maricopa County, Arizona; that three fourths of the cattle rightfully belonged to the estate of James Roarke, deceased; that the administratrix of the said estate held possession of the entire band, claiming title thereto; and that Christy, the appellee herein, claimed title to the one-fourth interest through the conveyances above mentioned, from William Roarke to William James Roarke, and from William James Roarke to himself. Evidence was introduced, without objection on the part of the defendants, showing that at the time of the execution of the conveyance to William James Roarke, the grantor, William Roarke owned the one-fourth interest in the cattle that is now in controversy. Defendants objected to the introduction of plaintiff's exhibits in evidence for the reason that they purported on their face to be conveyances by bill of sale of certain cattle on the range; that they were not such instruments in writing as are provided for by the statute for the conveyance of cattle or brands of cattle upon the range, and consequently were immaterial and irrelevant. This objection does not in fact go to the instruments offered, but attacks the transactions they tend to prove, and is more plainly stated in argument by counsel in the words: "Under this statute a purchaser only acquires title to cattle upon the range by a compliance with its terms. A bill of sale to cattle ungathered and upon the range, unaccompanied by actual delivery, which bill of sale only purports to convey the cattle themselves, and not the brand, is ineffectual to convey title to either the brand or the cattle, just as much as a verbal sale would fail to convey title to real estate." The question is presented, Does act No. 6 of the Laws of 1897, termed the "Live-Stock Law," provide for the conveyance of cattle on the range by bill of sale without actual delivery? An examination of that act discloses no express provision of this character, and the question therefore arises, is such transaction dependent upon special statutory authority, or is it permissible under the general laws for sale of personal property, unless inhibited by special statute? The appellants contend that the law recognizes no power on the part of the owner to sell cattle, except that conferred by the act in question, whereas the appellee claims that the authority to sell is recognized at common law, and can be exercised in the usual method of conveying personal property, except

where otherwise provided by statute, and that, as the statute does not provide any particular manner in which cattle such as these in controversy should be sold, the owner could sell and transfer the same in like manner as any other personal property. In *Tome v. Dubois*, 6 Wall. 548, 18 L. Ed. 943, the United States supreme court held that "in a sale of personal property actual delivery is not essential, as it is well settled that when the terms of the sale are agreed on, and the bargain is struck, and everything the seller has to do with the property is complete, the contract of sale becomes absolute between the parties without delivery, and the property and risk vest in the purchaser"; and, unless there is some restrictive statutory provision to prohibit it, a deed or bill of sale, properly executed and acknowledged, attesting such sale and transfer, would be competent evidence to establish the same. In *Nance v. Barber*, 7 Tex. Civ. App. 111, 26 S. W. 151,—a case very similar to the one at bar,—the question was whether a sale of certain cattle was valid. The sale had been made by bill of sale, unrecorded, of one hundred and sixteen head of cattle, which were, as the court held, running on the range. No segregation of the cattle or delivery of them had been made. The court said, referring to a statute almost identical with ours: "In sales covered by this statute, it cannot be doubted that, in order for the purchaser to acquire title to the property, he must take a written conveyance, and have the same duly recorded. But, in our opinion, the statute does not apply to the sale from Nance to the plaintiff. By its terms it is limited to the transfer of live-stock as they run in the range, by the sale and delivery of the brands and marks. . . . Such transactions were commonly known as and designated a 'sale of a mark and brand.' It is to these sales that the statute in question refers, and, as it places restrictions upon the right of an owner to sell his property,—one of the most valuable rights incident to ownership,—we do not feel at liberty to extend its meaning to transactions that are not embraced within its terms. . . . This was not a transfer by sale of the marks and brands." Does the aforesaid act No. 6 prohibit the sale or transfer of live-stock in the manner here under consideration? An examination of the statute shows conclusively that it does not. It makes special provisions for using and recording brands and for holding and

disposing of live-stock in several instances, but these are provisions for the benefit of the owner of live-stock, and only affect the manner of holding, handling, branding, and transferring live-stock as therein provided, and do not affect the general rights of owners of this class of property to sell or transfer their live-stock in any other manner than those therein specifically defined. The plaintiff's exhibits were therefore properly admitted in evidence, under the general rules of evidence, and were material and relevant, as they tended to establish the fact in issue.

The second assignment of error alleges that the court erred in rejecting the defendants' Exhibit No. 1, which was a certificate of the secretary of the live-stock sanitary board that the brand on the left hip of cattle and on the left thigh of horses "was duly recorded under the provisions of section 50 of act 6 of the nineteenth legislative assembly of Arizona, for James Roarke, in the territorial brand-book No. 1, page 18," with the seal of the board attached. The defendants offered this certificate in evidence for the purpose of showing *prima facie* title to the cattle and brand mentioned in the certificate to be in the party in whose name it was recorded. The plaintiff objected to the introduction of the exhibit for the reason that it was not proper evidence of title; that it was incompetent for the purpose as alleged by the party offering it, and established no title whatever to the cattle in question in the defendants, as against the plaintiff; and for the further reason that it was a self-serving declaration,—which objection was by the court sustained. The appellants claimed that under the provision of section 50 of act No. 6 of the Laws of 1897 the certificate was admissible for the purpose of showing *prima facie* title to the cattle to be in the estate of James Roarke, deceased. Said section 50 provides that "at any time before the first day of July, after the passage of this act, it shall be the duty of the persons owning brands and marks, to file the same with the said board and the said board shall record the same in a book of brands and marks, and shall furnish the owners certificates thereof under the seal of the said board, free of charge, which said certificate shall be competent evidence of the registration of such brands, and *prima facie* evidence of ownership." If the ownership of the brand or the fact of its registration was in controversy,

the provision quoted would be applicable; but, as we have already seen in the consideration of the former assignment of error, the title to the brand is not in controversy. The conveyance did not purport to be a transfer or conveyance of the brand. Neither is the registration of the brand an issue in the case. Section 50 applies solely to the requirement for and the manner of the registration of brands, the proper evidence of such registration, and the ownership of the brands thus registered, and does not deal with the cattle that may be in such brands, the mode of their transfer, or the evidence of their ownership. There is a very material difference between the certified copy of a record and the certificate of an officer to what a record contains. Under the general rules of evidence, a public record can be proven by a copy thereof duly certified to by the proper and legal custodian of the record, but the courts will not assume that the conclusions drawn by such officer from the inspection of the records are correct. A certificate, therefore, of an officer as to the contents of such public record, based upon his summary or recital of what it contains, is not evidence, except in such instances as such certificate may be expressly constituted legal evidence by statute. Jones on Evidence, par. 556; *Tessman v. Supreme Commandery*, 103 Mich. 185, 61 N. W. 261. While, therefore, section 50 of the said act constitutes the certificate of the registration of a brand competent evidence of such registration, and *prima facie* evidence of the ownership of such brand, it does not make such certificate either competent or *prima facie* evidence for any other purpose. Consequently, neither the registration nor the ownership of the brand being in question, the provision of section 50 would not constitute such certificate evidence in this case. Not being a certified copy of any record, it was not entitled to be admitted under the general rules of evidence, and it was therefore properly excluded. These being the only errors assigned, the judgment of the district court is affirmed.

Sloan, J., and Davis, J., concur.

[Criminal No. 150. Filed March 19, 1901.]

[64 Pac. 421.]

WILEY M. MORGAN, Indicted as Wiley Morgan, Defendant
and Appellant, v. TERRITORY OF ARIZONA, Plain-
tiff and Respondent.

1. CRIMINAL LAW—HOMICIDE—CHARGE TO THE JURY—MALICE AFORETHOUGHT.—An instruction that "If the deceased was unlawfully, feloniously and unjustifiably shot and killed by the defendant, as charged in the indictment; that the killing was the result of malice suddenly produced at the time the fatal shot was fired, and was without premeditation or deliberation, then it is your duty to find the defendant guilty of murder in the second degree," is not bad as omitting the essential element in murder,—to wit, malice aforethought,—since in order to find defendant guilty under this charge the jury must find the killing to be the result of malice, and malice, the cause, must of necessity precede the killing, the result.
2. SAME—BURDEN OF PROOF—INSTRUCTIONS AS TO PROPERLY REFUSED WHERE COURT FULLY CHARGED ON THE SUBJECT.—It is not error to deny requests for charges on behalf of defendant pertaining to the burden of proof and the degree of proof necessary to establish the guilt of defendant so as to warrant a conviction, where an examination of the charge given by the court discloses no omission to charge the law fully upon the point.
3. SAME—HOMICIDE—SELF-DEFENSE—CHARGE TO JURY—BODILY INJURY OR LOSS OF LIFE—REASONABLE BELIEF AS TO EXISTENCE OF—REV. STATS. ARIZ. 1887, PEN. CODE, PARS. 285, 286, CONSTRUED.—A charge that one of the conditions under the right of self-defense which may be asserted is, "that the killing of the other was necessary in order to prevent the infliction upon himself of great bodily injury or loss of his life" is erroneous, in that it does not recognize a reasonable ground for the belief that the killing is necessary on the part of defendant sufficient to excite the fears of a reasonable person as provided in the statutes, *supra*, defining the right of self-defense.
4. SAME—SAME—SAME—SAME—SAME—SAME—SAME.—Upon a trial for homicide the defense was that of justifiable homicide, upon the ground that the defendant's life was in danger, and the killing of the deceased was necessary for his self-protection. The charge, in effect, stating that the defendant was justified in acting on appearances and belief, if the actual necessity existed of killing the deceased in order to prevent great bodily injury to himself, is an imperfect statement of the law of self-defense, as contained in the statutes, *supra*, in that the seeming necessity arising from circum-

stances sufficient to excite the fears of a reasonable person that the deceased was about to do him some great bodily injury, and that there was imminent danger of such design being accomplished, as a justification, is not made clear and definite.

5. SAME—SAME—SAME—INSTRUCTIONS TO JURY—REASONABLE GROUND TO BELIEVE THAT DANGER OF GREAT BODILY INJURY OR LOSS OF LIFE EXISTED—REFUSAL TO GIVE—ERROR WHERE NOT PROPERLY COVERED IN GENERAL CHARGE.—Defendant, on trial for murder, and claiming self-defense as a justification, requested the following charge: "If the defendant, in the position in which he was then placed, and with the light and knowledge which he then had upon the subject, had reasonable ground to believe that the deceased intended to kill him or do him some great bodily injury; and if the circumstances as they came to his knowledge at that time, were sufficient to excite the fears of a reasonable person, that the deceased was about to murder any person, or to commit a felony, or to do him a great bodily injury, and the danger thereof was imminent, and if, acting upon these fears, the defendant killed the deceased to protect himself therefrom, then such killing, under such circumstances, was justifiable." *Held*, that the refusal to give this request, or to give a similar charge, the matter not being properly covered by the general charge, was error.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Reversed.

The facts are stated in the opinion.

Hereford & Hazzard, and A. C. Baker, for Appellant.

C. F. Ainsworth, Attorney-General, and Edward W. Land, District Attorney, for Respondent.

SLOAN, J.—The appellant, Wiley M. Morgan, was indicted and tried in the court below for the murder of one John Duncan. The indictment charged murder in the first degree, but he was convicted of murder in the second degree, and sentenced to twenty years' imprisonment in the penitentiary. Defendant moved the trial court for a new trial, which was refused, and from this ruling he appeals to this court.

The court, in its charge, gave the statutory definition of murder, and, as well, of the two degrees of murder. Following this definition, the court charged as follows: "If you believe from the evidence, beyond a reasonable doubt, that the

said John Duncan was unlawfully and feloniously shot and killed by the defendant with malice aforethought, as charged in the indictment; that the shooting and killing was the willful, deliberate, and premeditated act of the defendant, and was done without excuse or justification,—then it is your duty to find the defendant guilty of murder in the first degree. If you believe from the evidence, beyond a reasonable doubt, that the said John Duncan was unlawfully, feloniously, and unjustifiably shot and killed by the defendant, as charged in the indictment, and that the killing was the result of malice suddenly produced at the time the fatal shot was fired, and was without premeditation or deliberation, then it is your duty to find the defendant guilty of murder in the second degree.” Appellant assigns as error that part of the latter instruction which states the circumstances which would constitute the homicide charged murder of the second degree. Counsel for appellant argued that that part of the instruction which says that if the deceased “was unlawfully, feloniously, and unjustifiably shot and killed by defendant, as charged in the indictment, and that the killing was the result of malice suddenly produced at the time the fatal shot was fired, without premeditation or deliberation,” he was guilty of murder in the second degree, contained fatal error, in that it omits the essential element in murder, to wit, malice aforethought. It is contended that an unlawful, felonious, unjustifiable killing, as the result of malice suddenly produced at the time of the killing, without premeditation or deliberation, does not constitute murder, under the statute; that the term “malice aforethought” involves the idea of some sequence between the intent to kill and the act of killing; and that this idea of sequence is omitted from the instructions. If it be true that the felonious intent to kill must precede the act of killing in point of time, in order to constitute murder of the second degree, the language of the trial court is not open to criticism in this regard, inasmuch as it is distinctly stated that the killing must be the result of malice suddenly produced at the time. A thing cannot result from another except the latter be in a sense a sequence, just as the cause must, in a sense, precede the effect. The language used excludes the idea that the act of killing can precede the intent to kill, otherwise it could not be a result of such intent. Our statute upon the

subject of homicide is taken from the statutes of California, and the construction given the definition of murder by the courts of that state is therefore authoritative. In the case of *People v. Bealoba*, 17 Cal. 339, it was held that: "Murder in the first degree consists of willful, premeditated, unlawful killing. The intent to kill must exist, and may be proved from circumstances, though it need not have existed for any length of time before the act. It is sufficient if it be formed upon the instant, if the killing be unjustified." If, as held by the California court, it be sufficient to constitute murder of the first degree that the intent to kill be formed upon the instant of killing, this doctrine applies with even greater force in the case of murder of the second degree; for in the former class premeditation and deliberation is required, while in the latter a formed intent at the time of killing only is required. We find no reversible error in the instruction.

A number of other errors are assigned, based upon the refusal of the trial court to give specific instructions asked for by the defendant. It is urged that these instructions should have been given, for the reason that they properly charged the law, and were needed in order to supplement the charge given by the court. A number of these pertain to the burden of proof and the degree of proof necessary to establish the guilt of the defendant so as to warrant a conviction. Examination of the charge given by the court discloses no omission to charge the law fully upon the latter point, and the requests, therefore, were properly denied by the trial court. The defense was that of justifiable homicide, upon the ground that the defendant's life was in danger and the killing of the deceased was necessary for his self-protection. It is urged that the court's instruction upon this point was erroneous, in that it contained the following language: "The right of self-defense is a right recognized by the statute, and the conditions under which it may be asserted, to make homicide justifiable, are well settled. They are: First, that the slayer is not himself the assailant or aggressor, or that if he was the aggressor, that he had in good faith sought to decline any further struggle before the fatal shot was fired; and, second, that the killing of the other was necessary in order to prevent the infliction upon himself of great bodily injury or loss of his life." It is charged that the second condition laid down by

the court as essential to the exercise of the right of self-defense is too severe, in this: that it does not recognize a reasonable ground for the belief that the killing is necessary on the part of the defendant, sufficient to excite the fears of a reasonable person, contained in those sections of the Penal Code appertaining to the right of self-defense. Had the instructions of the court stopped with this definition, the law would certainly have been inadequately declared. The right of self-defense is primarily based upon necessity, but this necessity need not in every case be actual, but a homicide is justifiable where the necessity for taking life be only seeming, provided that the circumstances be sufficient to excite the fears of a reasonable person, and to induce the belief in the mind of such person that such taking of life is necessary, and the killer be influenced by no other fear or motive. The court supplemented the charge here quoted by the use of the following language: "If you find from the evidence that the deceased made the first hostile demonstration against the defendant, under such circumstances as would have justified a reasonable man in defendant's situation in believing that the deceased was about to inflict upon him great bodily injury, then the defendant was justified in acting on those appearances and that belief; and, if necessary to prevent great bodily injury to himself, he fired the fatal shot that killed the deceased, he was justified in so doing." An examination of the latter instruction will show that it is an imperfect statement of the law of self-defense as that law is contained in paragraphs 285 and 286 of the Penal Code, in that the seeming necessity arising from circumstances sufficient to excite the fears of a reasonable person that the deceased was about to do him some great bodily injury, and that there was imminent danger of such design being accomplished, as a justification, is not made clear and definite. In effect, the charge stated that the defendant was justified in acting on appearances and belief if the actual necessity existed of killing the deceased in order to prevent great bodily injury to himself.

Counsel for the defendant requested the trial court to give the following instruction: "If you believe from the evidence that the defendant had reasonable ground to apprehend a design on the part of deceased to commit a felony or to do some great bodily injury, and that there was imminent danger

of such design being accomplished, and that for that purpose, in good faith, of defending himself from such design or such injury, the defendant shot and killed the deceased, then you are instructed that such killing under such circumstances was justifiable." This request was refused, as was also a request that the jury be instructed as follows: "The question for you to determine is not only whether, as a matter of fact, the deceased then and there attempted or threatened to murder any person, or to do some great bodily injury to any person; but you should consider whether the defendant, in the position in which he was then placed, and with the light and knowledge which he then had upon the subject, had reasonable ground to believe that the deceased intended to kill him or do him some great bodily injury; and if the circumstances, as they came to his knowledge at that time, were sufficient to excite the fears of a reasonable person that the deceased was about to murder any person, or to commit a felony, or to do him a great bodily injury, and that the danger thereof was imminent, and if, acting upon these fears, the defendant killed the deceased to protect himself therefrom, then such killing, under such circumstances, was justifiable." Neither of these requested instructions was open to serious criticism, either as to the language used or as embodying the rules of law on the subject of the right of self-defense, except that if in the latter instruction, in the clause "and if, acting upon these fears, the defendant killed the deceased," the word "alone" had been inserted, so as to make the clause read, "and if, acting upon these fears alone," etc., the statutory definition of the right of self-defense and its qualification would have been more accurately expressed. We think it was the duty of the trial court to give these or similar instructions, and his refusal to do so was error. The judgment of the district court must be reversed, and the cause remanded for a new trial.

Street, C. J., and Doan, J., concur.

[Criminal No. 151. Filed March 19, 1901.]

[64 Pac. 419.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. RAFAEL SOTO, Defendant and Respondent.

1. CRIMINAL LAW—PUBLIC LANDS—TIMBER—MESQUITE MAY BE—REV. STATS. U. S., SEC. 2461, CONSTRUED.—The statute, *supra*, makes it an offense to cut any live-oak or red-cedar trees or "other timber on any lands of the United States, with intent to use the same in any manner other than for the use of the United States navy." *Held*, that the word "timber" includes all kinds of wood used either for building purposes or in the manufacture or construction of useful articles, and was not intended to be confined to trees or wood of such kinds and sizes as would be especially adapted to house or ship-building.
2. SAME—SAME—SAME—QUESTION OF FACT—INDICTMENT—DEMURRER—REV. STATS. U. S., SEC. 2461, CONSTRUED—BUSTAMANTE v. UNITED STATES, 4 ARIZ. 344, 42 PAC. 111, DISAPPROVED.—In a prosecution under the statute, *supra*, for cutting timber upon lands of the United States, the question of whether or not mesquite is timber must necessarily be one of fact, dependent upon the character of the wood charged and shown to have been cut or removed in each particular case, and is not a question which can properly be determined upon a demurrer to the indictment.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Declared error.

The facts are stated in the opinion.

Robert E. Morrison, United States District Attorney, and
T. D. Bennett, Assistant United States District Attorney, for
Appellant.

Joseph H. Kibbey, for Respondent.

DAVIS, J.—This is a criminal case, and the appeal is taken by the government on a question of law alone, which was decided adversely to the appellant in the court below. The prosecution was founded upon section 2461 of the Revised Statutes of the United States, which declares that "If any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live-oak or red-cedar

trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing any live-oak or red-cedar trees or other timber, from any . . . lands of the United States, . . . with intent to export, dispose of, use, or employ the same in any manner whatever, other than for the use of the navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months." After the usual jurisdictional and necessary averments, the indictment charged "that the said Rafael Soto, within and upon the public unsurveyed lands of the United States, and upon the lands known and designated as the 'Camp McDowell Military Reservation,' did unlawfully, willfully, and wrongfully cut, cause to be cut, remove, and cause to be removed therefrom, mesquite trees and mesquite timber, to wit, five hundred mesquite trees, of the value of two hundred and fifty dollars, lawful money of the United States, with the intent then and there to use and dispose of the same in a manner other than for the use of the United States navy." The defendant demurred to the indictment on the ground that the facts stated did not constitute a public offense, relying upon the former adjudication of this court in *Bustamente v. United States*, 4 Ariz. 344, 42 Pac. 111, wherein it was distinctly held that "mesquite is not 'timber,' within the meaning of said section 2461." The district court, following the authority of that decision, sustained the demurrer, and ordered that judgment be entered dismissing said cause and discharging the defendant.

Counsel for the government have brought this appeal upon the theory that there is manifest error in the ruling and judgment of the lower court, and that the correction thereof is important to the proper and uniform administration of the criminal law. We are asked to review the holding in *Bustamente v. United States*, *supra*, as that case involved the same questions which are here again presented for our consideration. These are: 1. Is mesquite timber or not, within the meaning of section 2461 of the Revised Statutes of the United States? 2. Can the question of whether mesquite is timber or not be properly determined upon demurrer to an indictment charging the unlawful cutting of mesquite on the public

domain? The term "timber," in its earlier signification, was applied chiefly to wood of the larger dimensions used in the building of houses and ships; but the general use of all kinds of forest trees for constructive purposes has given to the term a less restricted meaning. Webster defines "timber" to be "that sort of wood which is proper for building, or for tools, utensils, furniture, carriages, fences, ships, and the like; usually said of felled trees, but sometimes of those standing." In this sense it would include all kinds of wood used either for building purposes or in the manufacture or construction of useful articles. The language of the section under which the indictment was drawn mentions particularly live-oak and red-cedar trees, and then refers to other timber, showing conclusively that it was not the intention of Congress to confine the protection extended to any particular class or kind of trees, but to apply it in its most general sense. And this interpretation is in accord with the use of the word "timber" in other enactments of Congress at places where its obvious meaning absolutely precludes the idea that the term was intended to be confined to trees or wood of such kinds and sizes as would be especially adapted to house or ship building. *United States v. Stores*, (C. C.) 14 Fed. 824. It is to be observed that in *Bustamente v. United States*, *supra*, this court conceded to the term its broader signification, but, upon what was assumed to be common knowledge, proceeded to characterize the mesquite as "a brittle, knotty, scraggy, fiberless, gnarled wood that can only be used for firewood. It is used in the manufacture of no useful article. It only inhabits the desert. . . . Neither a ship-carpenter, molder, cabinet-maker, last-maker, carriage-builder, nor any other kind of wood-worker would include mesquite in their several classifications of timber,"—from which the court in that case reached the conclusion that Congress did not intend to include it in the term "timber" when it passed this law; and for the reason that mesquite was not timber, within the meaning of the law, it was ruled that the demurrer to the indictment should have been sustained. If the wood in question is accurately distinguished by the description given to it by the learned judge who wrote the prevailing opinion in the *Bustamente* case, and the characteristics therein mentioned are commonly known and recognized, then, doubtless, his con-

clusion is correct. But investigation into the various growths, character, and known uses of the mesquite tree will not, we believe, warrant the sharply defined limitation which the court, from judicial knowledge, has placed upon its utility. From the Century Dictionary we obtain the following definition: "Mesquite. An important leguminous tree, or often shrub, *Prosopis juliflora*, growing from Texas to southern California, and thence southward to Chile. It reaches a height of 30 or 40 feet, but is often scrubby, forming dense clumps of chaparral. Under the action of prairie fires it is reduced to a low shrub, developing then an enormous mass of roots, locally known as underground forest, of great value as fuel. The wood is heavy, and very hard, almost indestructible in contact with the ground. It is used for the beams and underpinnings of adobe houses, for posts and fencing, for fuel, and for furniture. It is of a brown or red color, handsome when polished, but difficult to work." For the region of Arizona the mesquite to a considerable extent fulfills the functions of a forest tree. Although used chiefly for fuel, its value for constructive purposes has also been recognized, and the use of mesquite of larger growth in the construction of buildings and fences here is sufficiently common to make it a matter of general knowledge. We hold, therefore, that in prosecutions under the foregoing statute the question of whether or not mesquite is timber must necessarily be one of fact, dependent upon the character of the wood charged and shown to have been cut or removed in each particular case, and that in the case at bar it was not a question which could properly be determined upon a demurrer to the indictment. This view leads to the disapproval of the law as declared in *Bustamente v. United States*, *supra*, and it also follows that there is error in the ruling and judgment of the lower court. But, as that judgment in this case operates as a bar to another prosecution for the same offense, the statute prevents its reversal.

Sloan, J., and Doan, J., concur.

[Criminal No. 152. Filed March 19, 1901.]

[64 Pac. 423.]

E. J. TAYLOR, Defendant and Appellant, v. TERRITORY
OF ARIZONA, Plaintiff and Respondent.

1. JUDICIAL NOTICE—RISING AND SETTING OF SUN.—Courts take judicial notice of the time of the rising and setting of the sun.
2. CRIMINAL LAW—BURGLARY—DEFINED—DEGREES—NIGHT-TIME—DEFINED—EVIDENCE—REVIEWED AND HELD SUFFICIENT TO CONVICT OF BURGLARY IN FIRST DEGREE—REV. STATS. ARIZ. 1887, PARS. 713, 715, 717, CITED.—Paragraph 713, *supra*, provides that "every person who enters any . . . store . . . with intent to commit grand or petit larceny, or any felony, is guilty of burglary." Paragraph 715, *supra*, provides that "Every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the day-time is burglary of the second degree." Paragraph 717, *supra*, provides that "The phrase 'night-time,' as used in this chapter, means the period between sunset and sunrise." The owner of a store testified that when he closed on the night of January 10th he noticed nothing wrong; that he was called and told of the burglary between 7 and 7:30 o'clock in the morning of January 11th. Sunrise occurred at 7:04 on the morning of January 11th. The evidence showed that the cellar door was broken open, a hole cut through the floor, the storeroom broken into, the safe blown open, and its contents methodically rifled and the escape of the burglar. *Held*, that there was sufficient evidence from which the jury could rightfully infer that the burglary was committed in the night-time.
3. SAME—SAME—LARCENY—EVIDENCE—PRESUMPTIONS—RECENT POSSESSION OF STOLEN GOODS—INNOCENCE PRESUMED UNTIL GUILT PROVEN—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 1645, CITED—TERRITORY v. CASIO, 1 ARIZ. 485, 2 PAC. 755, EXPRESSLY OVERRULED.—The possession of stolen goods by the accused recently after a burglary or larceny, if unexplained, is a circumstance from which the jury may infer complicity therein, but the law raises no presumption from that or any other fact against a defendant, expressly declaring in the statute, *supra*, that "a defendant . . . is presumed to be innocent until the contrary be proved, and in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted." *Territory v. Casio, supra*, is expressly overruled.
4. SAME—SAME—CHARGE TO JURY—STATING A LEGAL PRINCIPAL IN THE ABSTRACT APPLICABLE TO THE EVIDENCE IN THE CASE NOT ERROR—NOR AN ASSUMPTION OF THE EXISTENCE OF FACTS.—A charge that

"where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual or exclusive possession of a person who gives a false account, or who refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct is evidence tending to prove not only that he stole the goods, but that he made use of the means by which access to them was obtained," does not assume the existence of certain facts as proven,—viz., that the defendant gave a false account, or refused to give any account, of the manner in which the checks came into his possession, and that his conduct was guilty at the time he was found with them in his possession,—as it only states a legal principle in the abstract, applicable to the evidence in the case, and hence is not objectionable.

5. **SAME—SAME—LARCENY—EVIDENCE—FACTS TENDING TO PROVE LARCENY TEND TO PROVE BURGLARY, WHERE LARCENY COMMITTED IN CONNECTION WITH BURGLARY—CHARGE TO JURY—EXPRESSION OF OPINION BY COURT—WHAT IS NOT.**—A larceny having been committed in connection with a burglary, testimony which tends to prove the larceny also tends to prove the commission of the burglary. It is not trenching upon the province of the jury to say that particular evidence tends to prove a matter which it clearly does tend to establish. Such an instruction is not an expression of opinion as to the weight or effect of the evidence, nor that any fact has been proved thereby.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

E. J. Edwards, for Appellant.

Possession of recently-stolen property is a circumstance to be considered by the jury, in connection with all the other evidence in the given case, in determining the guilt or innocence of the accused; and its weight as evidence, like that of any other fact, is to be determined by them alone. *People v. Chambers*, 18 Cal. 383; *People v. Ah Ki*, 20 Cal. 178; *People v. Noregea*, 48 Cal. 123; *State v. Humason*, 5 Wash. 499; *Watkins v. State*, 2 Tex. App. 73; *Johnson v. Territory*, 5 Okla. 695, 50 Pac. 90; *State v. Kirkpatrick*, 72 Iowa, 500, 34 N. W. 301.

"Possession of stolen property may or may not be a criminalizing circumstance, and whether it is or not depends upon

the facts and circumstances connected with such possession." *State v. Walter*, 7 Wash. 246, 34 Pac. 938; *State v. Gray*, 23 Nev. 301, 46 Pac. 801; *Johnson v. Territory*, 5 Okla. 695, 50 Pac. 90.

C. F. Ainsworth, Attorney-General, for Respondent.

DAVIS, J.—The appellant was convicted of burglary of the first degree, alleged to have been committed on or about January 10, 1900, by entering a store in the night-time with intent to commit larceny. He appeals from the judgment, and assigns two grounds of error, upon which he relies for reversal.

1. It is first claimed that the evidence is insufficient to sustain the verdict and judgment. Under our statute, "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, . . . with intent to commit grand or petit larceny, or any felony, is guilty of burglary." Pen. Code, par. 713. "Every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the day-time is burglary of the second degree." *Id.*, par. 715. "The phrase 'night-time,' as used in this chapter, means the period between sunset and sunrise." *Id.*, par. 717. From the statement of facts it appears that on the night of January 10, 1900, or in the early morning following, the store of one Victor B. Bloom, in the town of Globe, was entered, the safe broken open, and some money and valuables taken therefrom, including about four hundred dollars in negotiable checks drawn by the Old Dominion Copper Mining and Smelting Company on the Bank of California, of San Francisco, California. About twelve days later the appellant, in person, presented these checks for payment at the bank upon which they were drawn, and was shortly thereafter arrested, brought back to Arizona, and prosecuted. Counsel for the appellant insists that there is no evidence in the record to show that the burglary was committed between the hours of sunset and sunrise. In this contention we think he is not sustained. Victor B. Bloom, the owner of the store which was burglariously entered, and a witness for the prosecution, testified as follows: "I did not notice anything out of the way in the store on the night of the 10th of January, 1900, when I closed up. I was called between 7 and 7:30 o'clock on the morning of the 11th

of January by Mr. Flood, who came running over and said the safe was blown open. I dressed in a hurry, and went over to the store. The safe had been blown open and the books thrown all over the floor, the money-chest drawn out, and the contents taken. The entrance was made through the cellar door. The cellar door was broken open by some one who got into the cellar, cut a hole through the floor, and got into the store. Checks and cash were taken. I can identify the checks. These are the checks that I cashed, and were afterwards taken out of my safe." It is a matter within the common knowledge of all, and a fact of which we take judicial notice, that in the locality of Globe, on January 11, 1900, the sun rose at 7:04 A. M. If, therefore, the burglary was not discovered before 7:30 A. M., there would be left only twenty-six minutes for the perpetration of the crime and the escape of the criminal, unless the operations were in progress before sunrise; and when it is considered that these operations necessarily included the successive acts of breaking open the cellar door, cutting a hole through the floor, getting into the store-room, blowing open the safe, methodically rifling its contents, and subsequent flight, we think there is not lacking evidence in this case from which the jury could rightfully infer that the burglary was committed in the night-time.

2. The appellant complains of the following instruction which was contained in the charge of the court: "The jury are instructed that, where a burglary is connected with a larceny, mere possession of stolen goods, without any other evidence of guilt, is not to be regarded as *prima facie* or presumptive evidence of the burglary. But where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual or exclusive possession of a person who gives a false account, or who refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct is evidence tending to prove not only that he stole the goods, but that he made use of the means by which access to them was obtained. There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of larceny." It is found frequently repeated in the books of the law that the recent unexplained possession of stolen goods

creates a presumption that the possessor is guilty of the theft. The nature of this presumption is thus stated by Greenleaf: "Possession of the fruits of crime, recently after its commission, is *prima facie* evidence of guilty possession; and if unexplained, either by direct evidence or by attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive." This statement has been quoted as the correct expression of the law in many cases, and in the early case of *Territory v. Casio*, 1 Ariz. 485, 2 Pac. 755, it was held by this court that "a prisoner's exclusive and unexplained possession of stolen property recently after the theft raises a presumption that he is the thief, and such presumption takes the burden of proof from the prosecution and lays it upon the prisoner." Many authorities, both English and American, ascribe to this presumption the character of a presumption of law, which means that, if it is not rebutted by direct evidence or by circumstances, it becomes conclusive against the prisoner. The more recent and better view, however, ascribes to it the character of a presumption of fact, which means that it is a presumption which the jury are at liberty to draw or not, as they shall see fit, and which hence does not necessarily become conclusive when not rebutted. The law really raises no presumption against a defendant in a larceny or burglary case, but expressly declares that "a defendant . . . is presumed to be innocent until the contrary be proved, and, in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted." Pen. Code, par. 1645. This does not mean that he is presumed to be innocent until one fact is proved against him in the case, namely, the exclusive possession of recently-stolen property. It requires more than one fact, however potent, to overthrow the presumption of the defendant's innocence. It requires the verdict of a jury, and until that verdict is returned and accepted by the court the defendant is throughout the case presumed innocent, and on the return of the verdict by the jury he is for the first time presumed to be guilty. *Johnson v. Territory*, 5 Okl. 695, 50 Pac. 90. We know that many kinds of personal property pass easily from hand to hand, and it is obvious that, if the mere possession is sufficient to convict, the innocent are as likely to suffer as the guilty. There are frequent cases in

which an explanation would be impossible, and in such cases to throw the burden of explanation upon the accused would be to slam the door of justice in his face. *People v. Chambers*, 18 Cal. 383. Moreover, a presumption which would require an explanation from the defendant to prevent it becoming conclusive of his guilt would be in direct conflict with paragraph 2040 of the Penal Code, which is intended to shield him from any unfavorable presumption which his refusal to testify might create. And, with all due respect for the previous adjudication of this court, we do not believe that the case of *Territory v. Casio*, *supra*, correctly states the law upon this point as it is understood and accepted by the modern and better authorities. Recognizing that the jury are the sole and exclusive judges of the facts proved, and the inferences to be drawn therefrom, an expression of the law more in harmony with the current authority would be substantially as follows: The possession of stolen goods by the accused recently after the larceny, if unexplained, is a circumstance from which the jury may infer his complicity in the larceny. Its value as evidence, however, is to be determined by them alone. In determining the weight to be attached to this circumstance as evidence tending to prove guilt the jury should take into consideration all the facts and circumstances connected with such possession, and their relation to the other proofs in the case. *Methard v. State*, 19 Ohio St. 363; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Smith v. State*, 58 Ind. 340; *State v. Hodge*, 50 N. H. 510; *State v. Walters*, 7 Wash. 246, 34 Pac. 938; *Johnson v. Territory*, 5 Okl. 695, 50 Pac. 90; *Lehman v. State*, 18 Tex. App. 174, 51 Am. Dec. 298. The point is sought to be made that the instruction in the case at bar assumed the existence of certain facts which had not been proven,—viz., that the defendant gave a false account, or refused to give any account, of the manner in which the checks came into his possession, and that his conduct was guilty at the time he was found with them in his possession. We do not give to the instruction that effect. The court was only stating a legal principle in the abstract. It was applicable to the evidence in the case, however. A witness for the prosecution (Edmond Byram) had testified to having seen the defendant present these checks at the bank in San Francisco, and that, when there seemed to

be some controversy about them, defendant went away, leaving them on the paying teller's window; that he again saw the defendant when under arrest, two days afterwards, at which time the latter denied all knowledge of the checks. The testimony of another witness (David Heron), who was a deputy sheriff at Globe, had been to the effect that he had gone to San Francisco to make the arrest; that on first meeting the defendant there the latter denied having any knowledge concerning the checks, and also stated that he did not know where the town of Globe was; that shortly after this conversation the defendant told him that he was the man who had presented the checks at the bank, and that he had received them from a friend named Burke. Other witnesses had testified to having seen the defendant in Globe about the time of the burglary. It is also objected that the jury was charged as to the effect of the evidence. In this case, a larceny having been committed in connection with the burglary, testimony which tended to prove the larceny would also tend to prove the commission of the burglary. It is not trenching upon the province of the jury to say that particular evidence tends to prove a matter which it clearly does tend to establish. Such an instruction is not an expression of opinion as to the weight or effect of the evidence, nor that any fact has been proved thereby. There is not contained in the instruction complained of any departure from the law which could have misled the jury to the prejudice of the defendant. No error appearing in the record, the judgment of the district court is affirmed.

Street, C. J., and Sloan, J., concur.

[Criminal No. 153. Filed March 19, 1901.]

[64 Pac. 441.]

JOHN R. WARD, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—MURDER—LESSE OFFENSES INCLUDED—CHARGE TO JURY—INSTRUCTIONS—FAILURE TO REQUEST—NOT ERROR TO OMIT—REV. STATS. ARIZ. 1887, PEN. CODE, PARS. 1643, 1677, 1678, 1679. CONSTRUED—CHUNG SING v. UNITED STATES, 4 ARIZ. 217, 36 PAC. 205; TERRITORY v. WEST, 4 ARIZ. 212, 36 PAC. 207.—The Revised Statutes of Arizona, *supra*, provides: "The judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party." Paragraphs 1677 and 1678, *supra*, permit either party to ask special instructions and prescribe the manner in which the same shall be settled. Paragraph 1679, *supra*, provides: "The court, in addition to the instructions provided for in the two preceding sections, shall, in charging the jury, state to them all such matters of law as it may think necessary for their information in giving their verdict." Upon a trial for murder there is no legal obligation upon the court to give instructions upon the several lesser grades of the offense, in the absence of a request, though there was evidence thereof.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

Edwards & McFarland, for Appellant.

"The defendant is entitled to have the law of manslaughter given to the jury, if there is any evidence whatever to which it is applicable, no matter how weak or insufficient it may appear to the court." Kerr on Homicide, sec. 526; *Territory v. Friday*, 8 N. M. 204, 42 Pac. 62; *Territory v. Nichols*, 3 N. M. 76, 2 Pac. 78; *Crawford v. People*, 12 Colo. 290, 20 Pac. 769; *State v. Cody*, 18 Or. 506, 23 Pac. 895, 24 Pac. 895; *People v. Keefer*, 65 Cal. 232, 3 Pac. 818; *McLaughlin v. State*, 10 Tex. App. 355; *Reynolds v. State*, 14 Tex. App. 434; *Moore v. State*, 15 Tex. App. 22; *McNevin v. People*, 61 Barb. 307; *Adams v. State*, 29 Ohio St. 412.

An indictment for murder is an indictment for man-

slaughter. *People v. Gilmore*, 4 Cal. 380; *People v. Apgar*, 35 Cal. 391; *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776.

C. F. Ainsworth, Attorney-General, for Respondent.

Appellant not having made any request for the court to instruct the jury as to the crime of manslaughter, it was not error for the court to fail to charge on that point. *State v. Hanlon*, 62 Vt. 334, 19 Atl. 773; *Thurman v. State*, 32 Neb. 224, 49 N. W. 338; *Barr v. State*, 45 Neb. 458, 63 N. W. 856; *McClary v. State*, 75 Ind. 260; *State v. Marqueze*, 45 La. Ann. 41, 12 South. 128; *People v. Ezzo*, 104 Mich. 341, 62 N. W. 407; *People v. McNutt*, 93 Cal. 658, 29 Pac. 243.

DAVIS, J.—The appellant, John R. Ward, was tried at the October term, 1900, of the district court of Graham County, upon an indictment charging him with the murder of one C. C. Jackson. He was convicted of murder in the second degree, and sentenced to a term of fifteen years' imprisonment in the territorial prison. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

It is assigned as error that the trial court failed and neglected to charge the jury on the law of manslaughter. The defendant admitted the killing of Jackson, and claimed in justification that the act was done in self-defense. The affray occurred in the Richelieu Saloon, at Clifton, on the evening of March 23, 1900. It appears from the evidence that about three quarters of an hour previous to the fatal rencounter the two men had a difficulty at the defendant's place of business, in the same town, over a game of monte, as a result of which the deceased left the place, accusing the defendant of robbing him. The defendant testifies that Jackson, in leaving, applied to him an opprobrious epithet, accompanied by the words, "If I had a gun, I would kill you." It also appears that a few minutes later Jackson went about, inquiring for a gun, and making threats against the life of the defendant; that this fact and the threats were shortly thereafter communicated to the defendant, who immediately put on his gun and started out, he says, for the purpose of going home to supper. He proceeded as far as the Richelieu Saloon, at the door of which he stopped. The deceased was

on the inside at the time, narrating in the presence of several bystanders his version of the recent gambling dispute, and repeating the charge that the defendant had been cheating or robbing him. Hearing these references being made to himself, the defendant entered the saloon. An altercation between the two men quickly ensued. There were a few exchanges of words, the lie was passed, one or two blows struck, and then the defendant, drawing his pistol, shot Jackson, the bullet entering the latter's body just below the left nipple and producing death in two or three hours. The deceased had no weapon. Concerning the relative actions and conduct of the parties immediately prior to the killing there is some slight controversy. As to the exact words which passed the witnesses do not agree, and the defendant himself makes contradictory statements. The testimony of the witnesses for the prosecution, however, tends strongly to show that the conflict was precipitated by the defendant. The testimony of five eye-witnesses is to the effect that the defendant first struck the deceased, and that when the latter struck a blow in return the defendant stepped back, drew his gun, and shot him. No witness except the defendant testified that the deceased made the first demonstration. His testimony, in so far as it relates to the circumstances of the killing, is substantially as follows: "I was going home to supper, and just as I got in front of the Richelieu Saloon I saw Jackson, and heard him talking to some men about me. I stood in the door, and then went in. Jackson was standing at the bar, with his elbow on the bar; and I walked past him to the far end of the bar, about ten or twelve feet from him. I said, 'I did not rob you, and I could not rob you if I wanted to,' and he says, 'You are not in your own house now, and cannot whip me,' and I said, 'You are a liar. I did n't rob you,' and he says, 'You are a liar. You did rob me,' and he came up near enough to hit me, and I threw up my left hand to ward off the blow, and he hit me a lick on the eye, and it reeled me back, and I put my hand on my eye, and drew my pistol and fired from my hip. The reason that I shot then was because I was afraid he would kill me, as the blow kind of dazed me. I stopped at the bar a minute, and some men came in, and then I walked to the door and gave myself up. I had heard several times that he was a bad man, and that

is why I shot as quick as I did. I did not know but that he would kill me then and there." On his cross-examination the defendant further testified: "It was about 5:30 o'clock in the evening when I left my place of business to go to supper. I had to pass the Richelieu Saloon on my way home. From what Change told me, I was very much afraid of Jackson. That is why I got my pistol and put it in my pocket. I was told he was a bad and desperate man. When I got opposite the door of the Richelieu Saloon, I heard Jackson say something about me, and I stopped a half a minute to listen to what he had to say, as I had heard that he had been making threats, and I wanted to avoid difficulty, and see if I could not square it with him. I went into the saloon to see if I could not fix the difficulty between us. I did not know whether or not he had a gun. I walked into the saloon and passed him five or six feet, when he said, 'Now, here is the man that robbed me.' I said, 'I did not rob you,' and he called me 'a greaser s—— of a b——.' He approached me and raised up his hand to strike me, and I threw up my hand to ward off the blow, but he hit me a very hard blow. He was a very strong man, and the lick staggered me back and dazed me. I threw my left hand over my eye, pulled my gun, and fired. From the force of the blow which I received, I thought he had something in his hand. Jackson was a bigger and stronger man than I am."

The trial court fully and fairly charged the jury as to the degrees of murder and the law of self-defense, and gave other general instructions, but gave no instruction defining or relating to the crime of manslaughter; nor was any requested by the defendant upon that point. Paragraph 1715 of the Penal Code provides that "the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." In the case before us it is conceded that if there was any evidence tending to prove that the offense was manslaughter, it is to be found in the testimony of the defendant alone. And the proposition is correct that the defendant is entitled to have the law of manslaughter given to the jury, if there be any evidence whatever to which it is applicable, no matter how weak or insufficient it may appear to the court; but the only question apparently neces-

sary for our determination here is whether error can be predicated upon the failure to instruct where no instruction was requested. Paragraph 1643 of the Penal Code prescribes the order in which a criminal trial shall proceed, and in the sixth subdivision thereof it is provided: "The judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party; and he must not state the testimony, but shall declare the law." Paragraphs 1677 and 1678 of the Penal Code permit either party to ask special instructions, and prescribe the manner in which the same shall be settled. Paragraph 1679 of the Penal Code provides: "The court, in addition to the instructions provided for in the two preceding sections, shall, in charging the jury, state to them all such matters of law as it may think necessary for their information in giving their verdict." The supreme court, in passing upon these several statutory provisions, has previously held that "the law of this territory does not make it the duty of the court to charge the jury, unless requested to do so in the manner therein mentioned." *Chung Sing v. United States*, 4 Ariz. 217, 36 Pac. 205; *Territory v. West*, 4 Ariz. 212, 36 Pac. 207. While under varying statutes there is some contrariety of judicial opinion with reference to the duty of a trial court in charging juries upon the different grades of felonious homicide, under our local law it is plain that, in the absence of a request therefor, there is no legal obligation upon the court to give instructions upon the several lesser grades of the offense. And while the defendant in this case would have been entitled to have had the law of manslaughter given to the jury, if he had so requested, and there was any evidence to justify it, having failed to request an instruction of that nature he cannot be heard to complain of his own neglect. *Barr v. State*, 45 Neb. 458, 63 N. W. 856, *Miller v. People*, 23 Colo. 95, 46 Pac. 111; *People v. Ezzo*, 104 Mich. 341, 62 N. W. 407; *State v. Marquezze*, 45 La. Ann. 41, 12 South. 128; *People v. Franklin*, 70 Cal. 641, 11 Pac. 797; *People v. McNutt*, 93 Cal. 658, 29 Pac. 243; *People v. Barney*, 114 Cal. 554, 47 Pac. 41; *People v. Arnold*, 116 Cal. 682, 48 Pac. 803; *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390. The cases cited by the appellant's counsel in support of the proposition that it is the duty of the court, without request, to

instruct the jury as to all the law applicable to the evidence were decided under statutes dissimilar to those of Arizona, and are not therefore in point. The record discloses no reversible error, and the judgment appealed from is affirmed.

Street, C. J., and Sloan, J., concur.

[Criminal No. 142. Filed March 19, 1901.]

[64 Pac. 492.]

JOSEPH TAMBORINO, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION—SCOPE—IMPEACHMENT.—On a prosecution for assault with intent to commit murder, a witness having testified to her presence at the affray, and as to what she saw and heard, it was proper to ask her on cross-examination if she had not made other statements about the matter, and, if she denied that she had, to show by other witnesses the statements she did make.

ON REHEARING. For former opinion, see *ante*, p. 194, 62 Pac. 693.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

Herndon & Norris, and G. H. Collins, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

PER CURIAM.—This is a rehearing. The first hearing on appeal was in the January term, 1900, and judgment of affirmance was rendered by this court November 9, 1900, reported, *ante*, p. 194, 62 Pac. 693. The principal subject there discussed, and which was the question discussed upon the rehearing, was, Did the court commit error in allowing impeaching evidence against the statements of Stella Carroll, a witness for the defendant? We there said the question to be solved was not whether in fact Tamborino had shot Tovera, nor whether in fact Tovera had shot Tamborino, nor

whether indeed either of them had been shot, but who had commenced the affray, or had it been commenced by Tamborino in such a way as to make the verdict of the jury of assault with a deadly weapon a correct verdict? Whether Tamborino had drawn his gun at the time the conflict commenced in such a way as to become the aggressor was an important inquiry. Stella Carroll was called as a witness for the defendant, was friendly to the defendant, and her evidence tended to show that Tamborino was not the aggressor. We still hold that her presence at the scene, her hasty departure, the fact of a shot being fired, and her evidence as to what she says she did not see, made it perfectly proper cross-examination to ask her if she did not make other statements about the matter, and, if she denied that she had, to show by other witnesses the statements she did make. The judgment of the district court is affirmed.

[Civil No. 743. Filed March 20, 1901.]

[64 Pac. 445.]

In the Matter of the Application of GEORGE MARTIN, Petitioner and Appellant, v. GUST. A. HOFF, Mayor of the City of Tucson, Arizona, Respondent and Appellee.

1. PUBLIC LANDS—TOWN-SITES—TRUSTEE—AUTHORITY TO DISPOSE OF UNOCCUPIED LOTS—WHENCE DERIVED—REV. STATS. U. S., SEC. 2387, COMP. LAWS ARIZ. 1871, SEC. 3, AND REV. STATS. ARIZ. 1887, TITLE 9, CHAP. 2, SECS. 1, 22, CONSTRUED—CLARK v. TITUS, 2 ARIZ. 122, 21 PAC. 818, FOLLOWED.—The Revised Statutes of the United States (Sec. 2387, *supra*) provides that certain officers may enter at the proper land office land settled and occupied as a town-site, in trust for the several use and benefit of the occupants thereof, the execution of said trust as to the disposal and sale of lots in said town, and of the proceeds thereof to be regulated by the legislature of the territory or state in which the same may be situated. The Compiled Laws of Arizona of 1871 (chap. 89, sec. 3), in force when the entry of the town-site of Tucson was made, provides that it shall be the duty of the party entering such town-site "to convey the same to the occupants and inhabitants thereof, according to their respective interests, in the manner hereinafter described." The Revised Statutes of Arizona of 1887,

supra, provides that whenever three or more citizens of a town located, or that may hereafter be located, on public lands request the proper authorities in writing, such authorities shall enter so much of the land under the act of Congress, *supra*, as is necessary for town purposes. Section 22, *supra*, provides that the lots undisposed of, the title to which remains in the trustee, shall be subject to entry and purchase from the trustee. *Held*, that *mandamus* will not lie to compel the trustee to transfer certain lots to petitioner under the provisions of Revised Statutes of Arizona of 1887, *supra*, inasmuch as the Compiled Laws of 1871, *supra*, controls the disposal of lots in Tucson.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Affirmed.

Herring & Mitchell, J. A. Zabriskie, and S. W. Purcell, for Appellant.

Rochester Ford, for Appellee.

STREET, C. J.—George Martin filed his petition in the district court of Pima County asking for a writ of *mandamus* directed to Gust. A. Hoff, mayor of the city of Tucson, trustee. The petition, summarized, is as follows: That Martin is a citizen of the United States, and a resident of Tucson, Arizona, and has been for ten years last past; that Gust. A. Hoff resides in said city, and is mayor thereof; that on the 1st of July, 1874, sections 12 and 13, in township 14 south, range 13 east, Gila and Salt River meridian, were granted and conveyed by the United States of America to Sidney R. De Long, mayor of the then village, now city, of Tucson, to him and his successors, in trust for the several use and benefit of the occupants thereof according to their respective interests, the same being in pursuance of the act of Congress (chap. 8, tit. 32, Rev. Stats. U. S.); that Hoff, as mayor, is successor in trust and holder of the legal title to the undisposed-of lands contained in said conveyance; that the legislature of Arizona, on the 10th of March, 1887, passed an act in relation to town-sites, being title 9, chapter 2, Revised Statutes of Arizona; that it is made the duty of Hoff, as successor to De Long and trustee, to execute deeds of conveyance of lots in said town-site to the occupants who have complied with the provisions of the said statutes and who

desire to become purchasers thereof; that on the first day of March, 1900, petitioner, Martin, under the provisions of said act of Congress and said act of the Arizona legislature, did enter upon, possess, and occupy lot 2 of block 257 of undisposed-of lands in said sections 12 and 13, describing it by metes and bounds, as it was marked and designated on a map and plat made by S. W. Foreman, and first adopted by the village of Tucson June 22, 1872, and again adopted by the city of Tucson on the 4th of December, 1899, being a part of the ground marked on the map "Occupied by the Military"; that the petitioner has erected substantial improvements on the lot, and has demanded in writing a deed of conveyance from said Hoff, mayor and trustee, as aforesaid, marked as an exhibit, and made a part of the petition, at which time he tendered forty dollars, purchase price of said lot, and five dollars for fee of trustee for filing and recording, and five dollars for acknowledging the deed; that he offered to make payment of any further required amount upon the delivery of the deed; said lot containing 12,295 square feet; that said Hoff had failed and refused to execute a deed therefor to the petitioner, and petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and prays for a writ of *mandamus* directed to said Hoff, mayor of the city of Tucson and trustee as aforesaid, demanding him to convey to the petitioner said lot. Further facts appearing from the exhibit filed with the petition and made a part thereof are: That said land, or a part of it, was first temporarily used by the military, and was so used at the time of the original survey of the city of Tucson, approved by the mayor and common council on June 26, 1872, of the then village of Tucson, and that the use by the military ceased on or about the year 1875, and that said land has had no occupant since that time, and was vacant and undisposed of from that time until the petitioner occupied it as aforesaid; that the said lot remains undisposed of, and the title of the same remains in the trustee, and the application of petitioner was made under and by virtue of the act of Congress (tit. 32, chap. 8, Rev. Stats. U. S.), and under and by virtue of the act of the legislature of Arizona (tit. 9, chap. 2, Rev. Stats. Ariz.), entitled "Town-sites." To this petition the respondent filed a demurrer, for that it did not

state facts sufficient to constitute a cause of action or to entitle the petitioner to the relief asked for. The demurrer was sustained by the court. Petitioner elected to stand upon his petition, and refused to amend the same, whereupon the court rendered judgment dismissing the petition. From that judgment petitioner appealed to this court.

The only error assigned relates to the order sustaining the demurrer and the judgment dismissing the petition. The petitioner seeks to obtain title to the lot in question by virtue of the acts of Congress and an act of the territorial legislature. Title 9, chapter 2, of the Revised Statutes of Arizona (par. 167) provides: "Whenever the citizens of any town located or that may be hereafter located upon the public lands of the United States, if the inhabitants of such town shall be incorporated, it shall be the duty of the corporate authorities thereof . . . to enter so much of the land under the act of Congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public land,' approved March 2, 1867, to which the town is entitled, as is necessary for its purposes." Paragraph 188 of said act provides: "The lots undisposed of as aforesaid, the title to which remains in the trustee, shall be subject to entry and purchase from the trustee at the rate of ten dollars per lot." Paragraph 191 of said act provides that, whenever the term of office of the officer making such entry of a town-site has expired, he shall turn over to his successor in office all books, papers, moneys, accounts, etc., and thereafter such trust shall be discharged in every particular by such successor in office. It is contended by respondent that said act has no application to entries made prior to 1887, and that, as it appears from the petition the entry of the Tucson town-site was made long before its passage, the petitioner cannot obtain title to his lot under such act. Some argument has surrounded the terms "located or that may be hereafter located," in which the petitioner insists that the word "located" has reference to all town-sites established before the passage of the act. In our judgment, the word "located" is not the pivotal term, but that the word "enter" is the term which must determine to what lands the provisions of the act are applicable. The plain reading of the act is that some officer must, after the passage of the act, enter in the land office a town-site, whether

the town had been located prior to the passage of the act or afterwards. There are many old settlements in the territory of Arizona which have never applied for a town-site patent. Their growth has not warranted, in their judgment, such action; but if after the passage of the act of 1887, and during its existence, they so desire, the proper officer would be required to make an entry for them; and when the entry shall be made the distribution of the lots would be controlled by the act in the same manner as though the location of the town-site had been made by a new community located after the passage of the act. At the time the entry was made of the Tucson town-site there was already existing an act of the territorial legislature governing the distribution of lots within the lands so entered. That act was passed February 16, 1871, as appears in the Compiled Laws of Arizona of 1871 (chap. 89). We have no information from the record of the date of the entry of the Tucson town-site, but it is certain the entry thereof in the land office was made some time before the first day of July, 1874, the date of the deed patent from the United States to Sidney R. De Long, mayor. Said chapter 89 of the Compiled Laws remained in force until the passage of chapter 2 of title 9 of the Revised Statutes of Arizona, March 10, 1887; and the disposition of lots included in lands entered as the Tucson town-site was controlled and controllable by that act alone. It is nowhere provided in the act of March 10, 1887, either in direct terms or by implication, that its provisions shall take the place of the provisions of chapter 89 of the Compiled Laws, in reference to the disposition of lots in a town-site entered during the existence of that act. The petition states that said lot has had no occupant since 1874, and has been vacant and undisposed of until the petitioner entered thereon on the first day of March, 1900, and asks that the property be deeded to him under the provisions of the statute of 1887, by producing the money regulated by the provisions of the act of 1887, and making the demand under said act. This is in effect asking that all the unoccupied lots in the town-site of Tucson remaining undisposed of to the present time be distributed under the provisions of the act of March 10, 1887, instead of the act of February 16, 1871; and this raises the question of the *status* of the title to the unoccupied lots of town-sites which have been entered under

the act of Congress of March 2, 1867, without territorial legislation, and the effect of the acts of the territorial legislature passed February 16, 1871, and March 10, 1887, in the disposition of such unoccupied lots.

The act of Congress of March 2, 1867, (sec. 2387, Rev. Stats. U. S.,) under which the town-site of Tucson was entered, provides that certain officers are permitted "to enter at the proper land office, at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trusts, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated." Section 3 of chapter 89 (Feb. 16, 1871) of the Compiled Laws of Arizona, in force at the time when said entry was made, or at least when said patent deed was executed, provides that it shall be the duty of the party entering such town-site "to convey the same to the occupants and inhabitants thereof, according to their respective interests, in the manner hereinafter prescribed." We think it has been fully settled by the supreme court of the United States that, so far as the act of Congress itself is concerned, the trustee had no powers except to execute deeds to the parties in occupancy and possession and entitled to possession at the time of the entry of the land in the land office by the proper authorities. The case of *Cofield v. McClelland*, 16 Wall. 331, 21 L. Ed. 339, arose under the construction of the act of Congress passed May 23, 1844, in relation to town-sites, and the act of Congress passed May 28, 1864, for the relief of the citizens of Denver. Each of those acts contained substantially the provisions of the act of March 2, 1867, providing that the entry by the proper officers shall be "in trust for the several use and benefit of the occupants thereof, according to their respective interests." The territory of Colorado, March 11, 1864, provided for the conveyance of the lots to the person or persons who shall have possession or be entitled to possession or occupancy thereof, according to his, her, or their respective rights or interests in the same as they existed in law or equity at the time of the entry of such lands, or to his, her, or their heirs or assigns; and the supreme court

said in reference to said act: "This regulating act of the territory is in harmony with the acts of Congress. It expresses more explicitly than do those acts the statements that the occupation and possession which gives the right is that which exists at the time of the entry of the lands by the probate judge. Those in possession of the land when the entry shall be made by the probate judge are the persons for whom he holds the land in trust, and to whom he is to make the respective deeds. Although less explicitly declared, this is the construction and meaning of the act of Congress also." In *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, 30 L. Ed. 469, in discussing the provisions of the act of March 2, 1867, the court said: "As thus seen, the act required the entry of land settled upon and occupied to be in trust for the several use and benefit of the occupants thereof according to their respective interests. . . . The power vested in the legislature of the territory in the execution of the trust upon which the entry was made was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might extend to the provisions for the ascertainment of the nature and extent of the occupancy of the different claimants of the lots, and the execution and delivery to those found to be occupants in good faith with some official recognition of title in the nature of a conveyance; but they could not authorize any diminution of the rights of the occupants when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy." As early as 1859 the supreme court of Michigan, in *In re Selby*, 6 Mich. 193, in construing the act of May 23, 1844, said: "While the entry is only allowed to cover such land as is actually occupied by the settlers it must, nevertheless, be made according to government subdivisions, as the law does not permit these to be broken in upon. Thus, in most cases, some land would be found in each subdivision not actually built upon, or otherwise occupied for town purposes. These lands the act clearly contemplates shall be sold, and the proceeds are to be disposed of under regulations to be adopted by the state legislatures, who are to establish rules and regulations for the whole execution of the trust. . . . While the act of Congress leaves the details of the use of the

proceeds of the surplus fund to be regulated by the legislature, it is very clear that the law designed that it should be used for the common benefit in some way." The supreme court of Colorado, in the case of *City of Denver v. Kent*, 1 Colo. 336, in discussing the same provisions, said: "The power of the corporate authorities is limited to the act of entry, and, when the land is entered, the party or parties so entering it become invested with a trust the execution of which is under the sole and exclusive direction of the local legislature. Until the legislature points out the method and prescribes the rules of procedure, the trustees are wholly incapable of conveying the legal title to the beneficiaries of the trust, or of disposing of the land for any purpose or to any person. . . . Some land would be found in each subdivision not actually built upon or otherwise occupied for town purposes. What, then, is to be done with this land not occupied or improved? To whom is it to go? Clearly, not to the general government, for its title has ceased by the issuing of the patent; not to the territory, for it never had any interest; not to the trustee, for he is a mere conduit or channel through which the title passed from the government to the *cestui que trust*; not to the individual citizen, for the act of Congress defines the extent of his individual interest. The trust is manifestly a double one,—the first a trust for the inhabitants of the town and as individuals; the other a trust for them collectively and as a community. . . . This whole matter is left to the local legislature. To it belongs the creation of the tribunal before whom individual rights shall be defended. It prescribes the kind of evidence necessary to make good a claim of title; it prescribes what kind of disposition shall be made of the money arising from the sale of lots; and in fact has full and plenary power over the whole subject-matter of the trust. And to strengthen this power conferred by Congress the law declares any act done by a trustee inconsistent with or in violation of the rules and regulations prescribed by the legislature for the execution of the trust shall be void and of no effect. Congress seems to have contented itself with declaring simply who might enter the land and denominating the *cestui que trust*. All else it hands over to the territorial legislature, which is better fitted, on account of its proximity to the subject-matter of the trust, to supervise and direct its

details." In reference to their own territorial statute they say: "By an oversight the legislature made no provision for the disposition of portions of this land to which no individual claim existed, and there is nothing in either act of Congress from which a power of sale in the trustee can be inferred and much to repel such an inference. The acts of Congress leave it altogether to the territorial legislature to determine what disposition shall be made, within the objects of the trust, of town lots belonging to the community at large, and of the proceeds of such of them as may be sold. This part of the trust most clearly cannot be executed without the intervention of local legislation. The trustee cannot sell under the acts of Congress, because they do not authorize him to sell any portion of the trust property, or to make any disposition whatever of moneys that might come into his possession on such sale. It being evident that it was the intention of Congress that the lands included within the town-site, and to which no rightful claim exists on the part of any individual, should be sold, and the proceeds disposed of under the directions prescribed by the legislature, who are to establish rules and regulations for the whole execution of the trust; and it being further evident that the legislature failed to provide for the disposition of the same, it is clear to us that any sale of such land made by the probate judge or trustee in the absence of these rules and regulations was wholly unwarranted, and absolutely void. It was entirely competent for him to make conveyances to those having a valid and rightful claim to the land at the time of entry, provided they furnished the proper and requisite proof. Beyond this his acts were *ultra vires*, and could in no manner affect the rights of the community." The same court, in the case of *Town of Aspen v. Rucker*, 10 Colo. 184, 15 Pac. 791, said: "The construction given by the courts of this state to the acts of Congress is that the entire town-site is required to be held in trust until finally disposed of as trust property. It is held in *City of Denver v. Kent*, 1 Colo. 336, that those portions to which no valid claims exist in favor of individual occupants are to be held in trust for the occupants collectively as a community. It was again held in *Georgetown v. Glaze*, 3 Colo. 234, and also in similar terms in *Smith v. Pipe*, 3 Colo. 187, to have been the purpose of the acts of Congress

to vest the estate and trust powers, not in the corporation itself, but in the trustee or trustees, in his or their official or political capacity, and to limit it to the successor in trust until the trust should be finally exhausted. The court further held that the entry in the name of the corporate officials of a town could not by construction of law inure to vest the estate in the corporation, and that no such intent was manifest in the act." The same doctrine is held by the supreme court of Utah in the case of *Lockwitz v. Larson*, 16 Utah, 275, 52 Pac. 279, and by the supreme court of Washington in the case of *Bingham v. City of Walla Walla*, 3 Wash. T. 68, 13 Pac. 408, and again in *Newhouse v. Simino*, 3 Wash. 648, 29 Pac. 263. Our own supreme court, in the case of *Clark v. Titus*, 2 Ariz. 147, 11 Pac. 312, held the same doctrine. They said: "The mayor held the title to these lots in trust for the occupants. He had no power to convey title to any one but to the occupants. The legislature of the territory had the power to regulate the manner of disposal of the lots and the execution of the trust, but there was no power to change or alter the conditions of the trust. The very object and purpose of the law was to prevent any private person or corporation from getting title to lots included in such town-site and holding the same for purposes of speculation." And again, in *Manufacturing Co. v. Tillman*, 3 Ariz. 122, 21 Pac. 818, they say: "The probate judge, after entering said land, holds it in trust for the benefit of those actually occupying the town-site, and it is his duty to make deeds therefor to the actual occupants, respectively, and to none others; and when he has made a deed for any portion thereof to a person it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person, and a person who has no interest in the land will not be allowed to question his acts." And, quoting from the case of *Sherry v. Sampson*, 11 Kan. 611, they say: "'An occupant, within the meaning of the town-site act of Congress, is one who is a settler or resident of the town, and in the *bona fide* actual possession of the lot at the time the entry is made. One who has never been in the actual possession of a lot cannot be said to be an occupant thereof.'" From these decisions, which we regard as the settled law, it is apparent that the unoccupied lots undisposed of after the trust has been primarily performed for the

benefit of those in occupation at the time of entry can be disposed of only by methods prescribed by the legislature. At the time the Tucson town-site was entered, or the patent deed was executed therefor to Sidney R. De Long, the then mayor of Tucson, chapter 89 of the Compiled Laws, approved February 16, 1871, was in force, and did make provision for the disposition of lots under the entry; and it did assume to make full provision for all such lots. Whether it effectually did so, and whether the act was sufficiently full and comprehensive and sufficiently minute and specific to perfectly accomplish the purpose of such disposition, is not now before us for discussion or settlement, and we only mean to say that the town lots in the town-site of Tucson were regulated by the statute of 1871 instead of by the statute of 1887. If the statute of 1871 did not succeed in accomplishing the purpose of providing a method for the disposal of all the lots within the town-site, those lots which remain with the trustee still remain with him to be disposed of under legislative proceedings. The act of 1887 in no way, either by express language or by implication, undertook to deal with the lots in town-sites which were entered during the existence of, and regulated by the provisions of, the law of 1871. Such lots were either disposed of under said act, or are disposable of under the provisions of said act, or yet remain with the trustee to be disposed of as the legislature may direct. If the title to those lots yet remains in the successors to the original trustee, Sidney R. De Long, they remain there until the action of the legislature may provide for their disposition. The act of 1887 only provided for lots within town-sites entered after the passage of the act, whether the settlement of the community or the location of the town had been made before that time or after. The demurrer to the petition for a writ of *mandamus* on the defendant, Gust. A. Hoff, asking him to act under the provisions of the act of March 10, 1887, was properly sustained. Judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 733. Filed March 20, 1901.]

[64 Pac. 443.]

**THE WALTER C. HADLEY COMPANY, a Corporation,
et al., Defendants and Plaintiffs in Error, v. D. W. CUM-
MINGS et al., Plaintiffs and Defendants in Error.**

1. MINES AND MINING—CONTRACT TO PURCHASE—MECHANIC'S LIEN—PURCHASER NOT AGENT OF OWNER—LEASE—REV. STATS. ARIZ. 1887, PARS. 2276, 2278, 2280, CONSTRUED—*EAMAN v. BASHFORD & BURMISTER*, 4 ARIZ. 199, 37 PAC. 24, DISTINGUISHED.—Paragraph 2276, *supra*, provides for a mechanic's lien on mines for any sums due for labor performed or materials furnished said mines. Paragraph 2278, *supra*, provides that all persons who furnish labor, machinery, or other material for the construction or operation of any mill or hoisting works at the request of the owner or his agent shall have a lien therefor. Paragraph 2280, *supra*, provides that the word "agent" shall be construed to include persons having charge of any mine or mining claim. Defendant company contracted for the sale of its mining claim, the contract providing that the deed should remain in escrow until all payments were made. The purchaser was to go into possession of the mine and operate it at his own expense and deposit the bullion or amalgam to the credit of the defendant company as collateral security for deferred payments. In the event of default in payment, the purchaser was to vacate the property. In accordance with the terms of such contract, the purchaser took possession of the property and employed plaintiffs to work on the same. Plaintiffs' accounts for labor were not paid, and they seek to enforce their liens against the defendants, the owners of the mine. *Held*, distinguishing *Eaman vs. Bashford & Burmister*, *supra*, that the purchaser was not an agent of the owners, but was at most a mere lessee, and that while the plaintiffs have a lien against the particular estate of the lessee, they have none against the property itself or against the owners' estate in said property.

ERROR from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. F. M. Doan, Judge. Modified and affirmed.

The facts are stated in the opinion.

Hereford & Hazzard, for Plaintiffs in Error.

The facts show that Kuhnen's relations with the Walter C. Hadley Company were those of lessee. *Block v. Murray*, 12

Mont. 545, 31 Pac. 550; *Pelton v. Minah Cons. M. Co.*, 11 Mont. 281, 28 Pac. 310. *Steel v. Argentine M. Co.*, 4 Idaho, 505, 95 Am. St. Rep. 144, 42 Pac. 585, discusses and distinguishes the case of *Eaman v. Bashford & Burmister*, 4 Ariz. 199, 37 Pac. 24, the distinction drawn applying to the case at bar. *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30.

Owen T. Rouse, for Defendants in Error.

STREET, C. J.—The defendants in error herein brought suit in the district court in and for Pinal County against the plaintiffs in error and one Charles F. Kuhnen, alleging that all the defendants were the owners of and in the possession of the mine, mining claim, mill, and pumping plant known as the "Mammon Mine and Mill," and that John N. Isgrig, one of the defendants, was the superintendent of said property, in full charge thereof. The Walter C. Hadley Company at all times were the owners of the Mammon mine and mill, and while such owners entered into an agreement with Charles F. Kuhnen as follows, to wit: "Know all men by these presents, that the Walter C. Hadley Company do hereby agree to accept from Charles F. Kuhnen the sum of \$16,500.00 as purchase price of the Mammon mine and mill, etc., together with an undivided one-half interest in the Yellow Jacket claim: provided, that \$2,900.00 now standing against the mine on the books of the Walter C. Hadley Company be also included: also, provided, the said Kuhnen protect the Walter C. Hadley Company against any claims that may be made by R. A. Heim, W. L. Morrow, John N. Isgrig, or by attorneys employed by John N. Isgrig in Kansas City in the Heim suit. The deed to be placed in escrow in the Consolidated National Bank, Tucson, Arizona, and \$9,000.00 in cash to be placed in same bank at the same time to the credit of the Walter C. Hadley Company. Also \$3,000.00 is to be placed to the credit of the Walter C. Hadley Company within ten days thereafter; the balance on one note for \$8,250.00 to be placed to the credit of the Walter C. Hadley Company before May 1st, 1897. One half of the \$16,500.00 is to be in cash; and a note for \$8,250.00, with interest from date at 8 per cent per annum, payable before May 1st, 1897, is to be given for the other half. Amounts paid in cash over and above the first

\$8,250.00 are to be credited on back of the note until note is paid. A note is also to be given by said Charles F. Kuhnen for \$2,900.00, payable to the Walter C. Hadley Company, to cover open account against the Mammon mine on the books of the above-named company. The last-named note to be payable on or before July 1st, 1897, with interest at 8 per cent per annum. Said Kuhnen to operate the mine from the date of the first cash payment of \$9,000.00 is made. The deed mentioned above shall remain the property of the Walter C. Hadley Company until the said two notes are paid in full. If on the 1st day of May, 1897, the note for \$8,250.00 is still unpaid, then C. F. Kuhnen is to vacate the property, and the Walter C. Hadley Company is to have full possession of same. All bullion or amalgam is to be deposited in the Consolidated National Bank as collateral security for the amounts due on notes. Pay-roll and all expenses from January 1st, 1897, to be paid by said Chas. F. Kuhnen, and all bullion shipped since January 9th, 1897, to belong to Chas. F. Kuhnen after notes and interest are paid. The Walter C. Hadley Company reserves the right to inquire into the financial standing and worth of Chas. F. Kuhnen and his wife." Kuhnen went to work upon the mine, and through Isgrig, as superintendent, employed the defendants in error to work upon the mine and about the mill. Their accounts for labor became due and were unpaid, and liens were filed. It is now sought to enforce those liens, not only against the interests of Kuhnen in the mine, but as against the interests of the owners, the Walter C. Hadley Company.

The only question we are called upon to determine is whether, under the contract between the Walter C. Hadley Company and Kuhnen, the interests of the Walter C. Hadley Company in the mine and mill are subject to lien. Paragraph 2276 of the Revised Statutes of Arizona, under the chapter providing for liens for mechanics, laborers, and others, reads: "All miners, laborers, and others who may labor, and all persons who may furnish material of any kind, designed or used in or upon any mine or mining claim, and to whom more wages are due for such labor or material, shall have a lien upon the same for such sums as are unpaid." Paragraph 2278 provides: "All foundrymen, boiler-makers, and all persons who labor or furnish machinery, boilers, castings

or other material for the construction, alteration, repairs or carrying on of any mill, manufactory, or hoisting works, at the request of the owner thereof, or his agent, shall have a lien on the same for the amount due him or them therefor." Paragraph 2280 provides: "The word 'agent' as used in this act shall be construed to include all contractors, subcontractors, architects, builders, and persons who have charge or control of any mine, mining claim, canal, water ditch, flume, aqueduct, reservoir, fence, bridge, mill, manufactory, hoisting works, or other property or thing upon which labor has been performed or material furnished." It is the settled law that, before one can be entitled to a lien for labor performed or materials furnished upon any property whatever, the labor performed or the material furnished must have been at the instance or request of the owner of the property, or some agent of his. Such agent may be either an agent in fact or in law. In the case of *Eaman v. Bashford & Burmister*, 4 Ariz. 199, 37 Pac. 24, this court did not depart from the rule that the employment must be made by the owner of the mine or by his agent. We only held that under the facts in that case the party who did employ the laborers must be considered, in the light of the statutes of Arizona, as the agent of the owner, and that the owner must have so understood it when the contract between himself and the lessee was entered into. The contract between the owner of the mine and the lessee contained the elements of a development contract, with an option to the lessee to purchase the mine for a specified price within a specified time. The contract itself, however, provided that Mott, the lessee, should operate the mines, and that the owner was to receive the net proceeds of the operation. Everything was to be done in the name of the owner. The bullion was to be shipped in his name, the returns were to be received by him, and he was to apply the proceeds in the discharge of the expenses of mining and milling the ores; and the only interest that Mott had in the operation of the mines was to satisfy himself as to whether he wanted to purchase them or not. If he purchased the mines, the money he turned over to the owner from the operation of the mines should go upon the purchase price. If he did not take the mines, the net proceeds were to remain with the owner. This

court said on that point: "A large portion of the supplies were furnished to Mott during the period when appellant was to take all the net proceeds. It seems just that his property be held for the payment of these supplies, especially when it was stipulated that the ore should first pay the cost of its extraction and reduction." Let us now look at the contract between the Walter C. Hadley Company and Kuhnen, and see if we find any such element. The first portion of the contract provides only for the sale of the mines by the Walter C. Hadley Company to Kuhnen for particular sums of money designated. The only provision about the operation of the mine contained in that contract is: "Said Kuhnen to operate the mine from the date of first cash payment of \$9,000 is made. . . . If on the first day of May, 1897, the note of \$8,250 is unpaid, then C. F. Kuhnen is to vacate the property, and the Walter C. Hadley Company is to have full possession of the same. All bullion or amalgam is to be deposited in the Consolidated National Bank as collateral security for the amount due on notes. Pay-roll and all expenses from January 1, 1897, to be paid by said Charles F. Kuhnen; and all bullion shipped since January 9, 1897, belongs to the said Charles F. Kuhnen, after notes and interest are paid." It would be impossible for any reasonable mind to understand that the owners, the Walter C. Hadley Company, had any interest in the working of the mines by Kuhnen. At most, he could be but a lessee; and we have already said, in the case of *Gates v. Fredericks*, 5 Ariz. 343, 52 Pac. 1118: "There is no statute, nor is there any principle which can be called into requisition, which makes the leaseholder the agent of the lessor. Parties furnishing material or doing labor for the leaseholder undoubtedly may have a lien against the particular estate of the leaseholder; but to hold the owner of the property responsible, and his estate in the property responsible, would be to put the landlord at the mercy of the tenant."

We think the district court erred in its judgment in making the Walter C. Hadley Company liable, and their interests in the Mammon mine and mill responsible for plaintiffs' labor accounts, and the subject of lien therefor. The judgment of the district court is modified to the extent that the interest of the Walter C. Hadley Company in the Mammon mine and

will be not subject to liens of the defendants in error, and that no personal judgment be rendered against them.

Sloan, J., and Davis, J., concur.

[Civil No. 695. Filed March 21, 1901.]

[64 Pac. 439.]

THE CROWNED KING MINING COMPANY, a Corporation et al., Plaintiffs, v. THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE TERRITORY OF ARIZONA, and ORRIN F. PLACE. Defendants.

1. SUPREME COURT — JURISDICTION — POWER — WRIT OF PROHIBITION — MAY BE ISSUED ALTHOUGH NOT MENTIONED *EO NOMINE* IN STATUTE — REV. STATS. U. S., SECS. 1866, 1868, AND REV. STATS. ARIZ. 1887, PARS. 591, 594, CITED AND CONSTRUED.—Section 1866 of the Revised Statutes of the United States provides that original and appellate jurisdiction of territorial courts shall be limited "by law." Section 1868 of the Revised Statutes of the United States provides that the supreme courts of every territory shall possess chancery as well as common-law jurisdiction. Paragraph 591 of the Revised Statutes of Arizona of 1887 vests the supreme court, in addition to the powers conferred on it by the laws of the United States, with full powers to discharge all duties required of it by the laws of the territory. Paragraph 594, *supra*, gives the court power to issue all writs necessary to a complete exercise of the powers conferred by law. *Held*, that the power of the supreme court to issue writs of prohibition has been conferred by Congress, and recognized by the territorial legislature, although no statute may exist which mentions the writ of prohibition *eo nomine*.
2. WRIT OF PROHIBITION—WHEN ISSUES AS MATTER OF RIGHT—WHEN DISCRETIONARY WITH COURT.—Where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary.

3. ~~SAME—SAME—SAME—FACTS REVIEWED AND WRIT DENIED.~~—Defendant brought suit against a foreign corporation and other persons, some of whom were non-residents, alleging that the corporation owned the property and was doing business in the county where the action was commenced, and that plaintiff and the managers of the corporation were residents of said county, and that the corporation, through its managers, was operating its property in such manner as to be detrimental to the interests of plaintiff, who was largely interested therein, and alleging other matters which could only be questioned in a court of the corporation's domicile. On an application for a writ of prohibition to prohibit the district court from trying said cause, it not being clear that the district court had no jurisdiction, the writ would not issue as a matter of right; and if the district court was in error in holding that it had jurisdiction, such decision being appealable, the granting of the writ being discretionary, it would be denied.

ORIGINAL APPLICATION for Writ of Prohibition.

The facts are stated in the opinion.

E. M. Sanford, and Herndon & Norris, for Plaintiffs.

That the supreme court has power to issue an original writ of prohibition, see Organic Act, sec. 1868; *Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 670; *Clough v. Curtis*, 134 U. S. 361, 10 Sup. Ct. 573; *Ferris v. Higley*, 20 Wall. 375; *Yearian v. Spiers*, 4 Utah, 369, 11 Pac. 618; *United States v. Peters*, 3 Dall. 123; *Kerr v. Wooley*, 3 Utah, 456, 24 Pac. 831; *Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453; *Kendall v. Raybould*, 13 Utah, 226, 44 Pac. 1034; *People v. Works*, 7 Wend. 486.

Robert E. Morrison, and Kretzinger, Gallagher & Rooney, for Defendants.

If the court has jurisdiction over any part of the subject-matter of a suit, it is no case for a prohibition. *Queen v. Twiss*, 4 L. R. 2 H. L. 413; *State v. District Court*, 22 Mont. 220, 56 Pac. 219; *State v. Benton*, 12 Mont. 66, 29 Pac. 425.

When a foreign corporation enters a state to transact business and establishes an agency there, the local courts have the same jurisdiction over it as over domestic corporations. *La Fayette v. French*, 18 How. 404; *Libby v. Hodgdon*, 9 N. H. 396.

The territory of Arizona has the right to make complete

submission to the jurisdiction of its courts a condition to the transaction of business within its limits. *Paul v. Virginia*, 8 Wall. 168; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281; *Macke v. Valley Town Min. Co.*, 89 Fed. 114; *Ernst v. Rutherford*, 38 App. Div. 388, 56 N. Y. Supp. 403.

Any court will entertain a suit to afford redress against frauds such as are alleged in this case if it can obtain personal jurisdiction over the perpetrators thereof by the legal service of process. *March v. Railway Co.*, 40 N. H. 548, 77 Am. Dec. 732; *Railway Co. v. Wallace*, 50 Miss. 244.

On the general question of the suability of foreign corporations, see *St Clair v. Cox*, 103 U. S. 330; *Railway Co. v. Harris*, 12 Wall. 65; *Hayden v. Androscoggin Mills*, 1 Fed. 92; *Young v. Providence*, 150 Mass. 550, 23 N. E. 579; *Shields v. Union etc. Ins. Co.*, 119 N. C. 380, 25 S. E. 951; *Telephone Co. v. Turner*, 88 Tenn. 265, 12 S. W. 544.

STREET, C. J.—The plaintiffs applied for a writ of prohibition in the supreme court, to be directed to the district court of the fourth judicial district of the territory of Arizona, in and for the county of Yavapai, and to Orrin F. Place, to prohibit said court and party from proceeding further in a suit brought in said district court by said Orrin F. Place against these plaintiffs. The defendants make answer to a rule to show cause why such writ of prohibition should not be issued, and plead: First, want of jurisdiction in the supreme court of the territory of Arizona to issue any writ of prohibition, for the reason that neither the laws of the United States nor the laws of the territory of Arizona authorize the supreme court of the territory of Arizona to issue writs of prohibition in any case whatsoever; and second, that the petition filed as an application for the writ fails to show any reason for the issuance of a writ of prohibition, but affirmatively shows that the district court had jurisdiction of the subject-matter of the complaint, which was the reason alleged in the application for a right of the plaintiffs to such a writ.

First, as to the power of the supreme court of Arizona to issue writs of prohibition. The supreme court of Arizona gets its jurisdiction and grant of power direct from the Congress of the United States—First, in the provisions of its

Organic Act; and second, in other statutes passed by Congress. Section 1908 of the Revised Statutes of the United States provides: "The judicial power in Arizona shall be vested in a supreme court and such inferior courts as the legislative council may by laws prescribe." Section 1866 provides: "The jurisdiction, both appellate and original, of the courts provided for in section 1908 shall be limited by law." Section 1868 provides: "The supreme court and the district courts, respectively, of every territory shall possess chancery as well as common-law jurisdiction." It is argued by the defendants that the supreme court of Arizona is a creature of special and limited jurisdiction, and in this particular is analogous to the supreme court of the United States, and cite many cases from the decisions of the supreme court of the United States to the effect that no power is given by the constitution or by statute to the supreme court of the United States to issue such writs; that the only instance in which the supreme court of the United States shall have power to issue writs of prohibition is granted by section 688 of the Revised Statutes of the United States, which provides: "The supreme court shall have power to issue writs of prohibition in the district courts when proceeding as courts of admiralty and maritime jurisdiction." We take it to be well settled that the supreme court of the United States obtains all its jurisdiction from the constitution and the statutes of the United States, and that, unless a power is therein specially granted, the supreme court has not common law and chancery jurisdiction. The Revised Statutes of Arizona provide (par. 591): "The supreme court of this territory shall consist of the judges appointed for the territory by the president of the United States, and in addition to the powers conferred upon them by the constitution and laws of the United States they are hereby invested with full powers to discharge all the duties required of them by the laws of this territory." The two following paragraphs (592 and 593) provide for the appellate jurisdiction of the supreme court, and paragraph 594 provides: "This court, and each of the justices thereof, shall have power to issue all writs necessary or proper to a complete exercise of the powers conferred by law and by this and other statutes." It is argued by the defendants that the grant of power conferred by section 594, following immediately

after paragraphs 592 and 593, which provide for their appellate jurisdiction, relates to such writs as would be necessary for them to issue in the exercise of their appellate jurisdiction, and can only be exercised in a particular case where the appellate power of the court has already been invoked, and a writ is necessary or proper to aid or effectuate the exercise of said appellate powers. We think that this court is not a court of limited and special jurisdiction, but that, in addition to its appellate jurisdiction, it has common-law and chancery powers conferred upon it by the statutes of the United States (sec. 1868) as effectually as if the court had been created by a state and was regulated in its jurisdiction by a state constitution; and it seems to us that, if the same provisions were contained in a state constitution governing the powers of a court erected by a state, there could be but little doubt about such a court being a court possessing chancery as well as common-law jurisdiction. Section 1866 provides that the appellate and original jurisdiction of the courts shall be limited by law, and that means that it may be limited either by congressional or by legislative enactments. Such power is recognized by the legislature when they say that, in addition to the powers conferred upon them by the constitution and laws of the United States, they are invested with full powers to discharge the duties required of them by the laws of the territory. It is further apparent that they have a right to use the common-law writs in aid of their original jurisdiction, as well as in aid of their appellate jurisdiction, by the language of paragraph 594, which says that they "have power to issue all writs necessary or proper to the complete exercise of the powers conferred by law, and by this and other statutes." By using the language "powers conferred by law" is meant the powers conferred by congressional law, as well as the powers regulated by territorial enactments. If the legislature intended to limit it to only such powers as were granted by the territory, they would not have used the words "powers conferred by law," but would have contented themselves with the language "by this and other statutes." Therefore, we say that the power of the supreme court to issue writs of prohibition has been conferred by Congress, and recognized by the territorial legislature, although no statute may exist which mentions the writ of prohibition *eo nomine*.

The next question is whether a writ of prohibition should issue in this case. The rule, as stated by the supreme court of the United States (*In re Rice*, 155 U. S. 402, 15 Sup. Ct. 152, 39 L. Ed. 201), is: "Where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary." In this case an action was commenced by Orrin F. Place in the district court of Yavapai County against the Crowned King Mining Company, a corporation, and others, applicants for this writ of prohibition, some of whom were residents of Arizona and some residents of Illinois. The Crowned King Mining Company is an Illinois corporation. The complaint was long, and in its language somewhat confusing as to some of the matters alleged or attempted to be alleged. It is quite possible that it complains of grievances which could be corrected in the courts of Illinois alone, and as to such matters the district court of Yavapai County could eliminate them from the complaint, or disregard them at the trial as surplusage. The complaint stating such matters gave rise to a plea upon the part of the defendants as to the jurisdiction of the district court to try any part of the complaint. The complaint, however, states other matters, and the question is whether there are such matters stated in the complaint as will give an Arizona court jurisdiction. The complaint in that particular alleges that the Crowned King Mining Company is owning mines and operating the same in Yavapai County, Arizona; that the plaintiff is a resident of Yavapai County, Arizona, and is largely interested in the company and its management, and that the managers of the operations of the mines for the company are residents of Yavapai County, Arizona; and alleges that they, and the company through them, are working and operating the property in such a way as to be detrimental to the interests of the plaintiff. It is not our province to determine whether the com-

plaint sufficiently states a cause of action, but it is our province to determine whether the district court would have jurisdiction over the subject-matter of the cause of action attempted to be stated. The district court, in considering the plea as to its jurisdiction, took into consideration such matters, either completely or indifferently stated, and held that the district court of Yavapai County had jurisdiction of a part of the subject-matter of such complaint, and overruled the plea to the jurisdiction. Under the rule laid down by the supreme court of the United States, it is plain the applicants could not obtain a writ under the first subdivision. Under the second subdivision the issuance of the writ would be under the discretion of the court, and, this court adjudging that, if the district court of Yavapai County has made a mistake as to the jurisdiction of the subject-matter of the complaint, it is plainly such an appealable order that a writ of prohibition should not issue. A writ of prohibition is denied.

Davis, J., and Doan, J., concur.

[Civil No. 724. Filed March 21, 1901.]

[64 Pac. 490.]

C. F. SCHUMACHER et al., Defendants and Appellants, v.
PIMA COUNTY, Plaintiff and Appellee.

1. EVIDENCE — COUNTY WARRANT — PAYMENT — SUFFICIENCY. — A county warrant signed by the chairman and secretary of the board of supervisors, indorsed by the payee, and marked "Redeemed and canceled" by the county treasurer is sufficient evidence of the payment of money voted and for which such warrant was issued.
2. SAME — ADMISSIBILITY — RESULTS OF EXAMINATION OF VOLUMINOUS RECORDS AND DOCUMENTS MAY BE GIVEN. — In an action by a county against the supervisors thereof to recover money unlawfully paid to the probate judge it is proper to admit testimony as to the results of the examination of the records of the probate court, it being a recognized exception to the general rule of evidence that when it is necessary to prove the results of voluminous facts or the examination of many books and papers, and the examination cannot conveniently be made in court, the result may be proved by the person who made the examination.

3. SAME—SUFFICIENCY—COUNTIES—OFFICE AND OFFICERS—ACTION AGAINST SUPERVISORS FOR MONEY UNLAWFULLY PAID—BOARD OF SUPERVISORS.—Evidence tending to show that during a period of years the legal fees chargeable by the probate court would be \$4,088.75, and that the probate judge had charged only \$2,190.40, and paid to the treasurer but \$1,643.45, is sufficient to sustain a judgment against the supervisors for having unlawfully paid salary to the probate judge when he was indebted to the county.
4. COUNTIES—OFFICE AND OFFICERS—BOARD OF SUPERVISORS—MEMBERS LIABLE FOR UNLAWFUL PAYMENT OF SALARY—PROBATE JUDGE—SALARY—FEES—DUTY TO COLLECT AND TURN OVER TO COUNTY—REV. STATS. ARIZ. 1887, PAR. 409, PAR. 1987 AS AMENDED BY LAWS 1889, ACT NO. 53, PAR. 428, AND PAR. 384, AS AMENDED BY LAWS 1893, ACT NO. 34, CONSTRUED—AVERY v. PIMA COUNTY, ANTE, P. 26, 60 PAC. 702, FOLLOWED.—Paragraph 409 *supra*, prohibits the county board of supervisors from allowing any demand against the county treasury, in favor of any person indebted to the county, without first deducting such indebtedness. Act No. 53, *supra*, limits the compensation of probate judge to a fixed salary. Paragraph 428, *supra*, requires that all fees shall be collected in advance and paid into the county treasury. Act No. 34, *supra*, makes the supervisors and party in whose favor the order is drawn responsible for all money unlawfully paid out of the county treasury for salaries on orders drawn by said board. *Held*, following *Avery v. Pima County*, ante, p. 26, 60 Pac. 702, that an action was properly brought against the board of supervisors and the assignee of a probate judge to recover salary paid to such assignee of said judge, the judge having failed to collect fees connected with his office and to turn over those collected, and being at the time of payment indebted to the county.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, and Barnes & Martin, for Appellants.

Rochester Ford, for Appellee.

DOAN, J.—From January 1, 1891, continuously until January 1, 1897, one J. S. Wood was the duly elected, qualified, and acting probate judge of Pima County. From January 1, 1891, to January 1, 1899, C. F. Schumacher, M. G. Samaniego, and Thomas Q. Bullock were the duly elected, qualified, and acting supervisors, and constituted the board

of supervisors of Pima County. On April 5, 1897, J. S. Wood assigned to C. F. Weber his claim against Pima County for three hundred dollars, on account of salary as probate judge for the fourth quarter of 1896. This claim was by Weber presented to the board of supervisors, and was by them allowed and ordered paid, and a warrant issued therefor, and on the same day (April 5, 1897) the said warrant was presented by Weber and paid by the county treasurer. This action was brought in May, 1897, against C. F. Schumacher, M. G. Samanigo, and Thomas Q. Bullock, as members of the board of supervisors of Pima County, for having, without authority of law, allowed and ordered paid to the said Weber the said claim, and against C. F. Weber as the party in whose favor the order was made. The allowance and order were alleged to have been unlawfully made by reason of the said Wood as such probate judge then being indebted to the said county for fees which he had earned and collected as probate judge, and had not paid into the county treasury as required by law. It was alleged in the complaint that the said J. S. Wood, at sundry and divers times since January 1, 1891, as probate judge, had collected in his official capacity fees for official services, amounting to the sum of twenty-five hundred dollars, and that he had failed to pay into the county treasury said amount or any part thereof; that during said time there were due to the said Wood for services performed by him as such probate judge fees in the sum of twenty-five hundred dollars, and that said Wood, as such officer, had willfully refused to collect said fees or any part thereof. The case was tried by the court without a jury, and judgment was rendered against the appellants for the sum of three hundred dollars, together with the statutory penalty of twenty per cent thereon, and interest and costs. From this judgment, and the denial of a motion for a new trial, the defendants appeal, and present ten assignments of error.

It is alleged in the seventh assignment that the court erred in striking from the record, on motion of appellee, the evidence of Wood to the payment of dues to the county. An examination of the record does not disclose any such ruling, but, on the contrary, the motion of appellee to strike the evidence from the record was by the court denied, except as to the part of Wood's testimony which was stated by the wit-

ness to be hearsay, and which the court said would not be considered for that reason.

The tenth assignment, alleging that there was no evidence that the money voted was ever paid by the county, was likewise not sustained by the record. The county warrant, signed by the chairman and the secretary of the board of supervisors, indorsed by Weber, the payee, and marked "Redeemed and canceled" by the county treasurer, was introduced in evidence by the plaintiff, and appears in the record.

The second, sixth, eighth, and ninth assignments of error raise the question of the sufficiency of the evidence to sustain the judgment, the determination of which would depend on the disposal of the third, fourth, fifth, and sixth assignments, which will be first considered, and which allege that the court erred in permitting the witness Bowman to give testimony as to the result of his examination of the books and records of the probate court and the treasurer's office. The testimony of Bowman was to the effect that he was employed by the board of supervisors to examine the records of the probate court of the county in the course of the investigation of charges against Probate Judge Wood for the non-payment of fees, and the failure or refusal to file sworn statements or reports. The witness stated that he was a lawyer; that he had been deputy clerk of the district court for four years, and assistant district attorney; that under his employment by the board of supervisors he had searched each transaction of the probate court from January 1, 1891, to November 18, 1896; that from the examination of the estates filed during that time the legal fees chargeable would be \$4,088.75. The amount that was charged was \$2,190.40. The amount that had been received, as shown by the receipts on file in cases, and from statements on file in final and annual accounts, was \$1,643.45. This testimony was received over the objection of defendant that it was secondary evidence, and therefore not competent, and this is the ruling of the court to which the counsel for appellants most strenuously object. The ruling of the court was unquestionably correct in this instance. It is well established, as a recognized exception to the general rule of evidence, that when it is necessary to prove the results of voluminous facts, or the examination of many books and papers, and the examination cannot be conveniently made in court, the result may be

proved by the person who made the examination. *Burton v. Driggs*, 20 Wall. 136, 22 L. Ed. 299; 1 Greenleaf on Evidence, par. 93.

It is alleged that the court erred in permitting the appellee to introduce the minutes of the board, the same not being in response to any issue in the case; but the record shows that the only purpose for which the minutes were introduced was to furnish evidence to establish the alleged indebtedness of Wood, for which purpose their introduction was proper.

The conclusion reached in regard to Bowman's testimony determines the question in regard to the sufficiency of the evidence as presented in the assignments above mentioned. These were predicated upon the incompetency of Bowman's testimony, which, if admitted in evidence, furnish sufficient evidence to sustain the judgment.

The Revised Statutes of Arizona of 1887 provide: In paragraph 409: "No demand on any county treasury shall be allowed by the board of supervisors in favor of any person in any manner indebted to the county, without first deducting such indebtedness." In paragraph 1987, as amended by act No. 53, 1889: "The only compensation allowed to county officials shall be the fees enumerated in this act, except assessors, who shall receive \$1,200 for all services required of them, and except probate judges, who shall receive \$1,200 per year for all services required of them as probate judge and *ex officio* clerk of the probate court." In paragraph 428: "In all counties where salaries are paid to them in lieu of fees, the sheriff, assessor, recorder, probate judge, and clerk of the probate court shall on the first Monday of each month in the year pay into the county treasury, except as by law otherwise provided, all money collected by them or received by them severally for fees. . . . It shall be the duty of every officer mentioned in the preceding section to collect in advance all fees, compensations, and percentage allowed by law." In paragraph 383, as amended by act No. 34 of the seventeenth legislature, approved April 3, 1893: "Whenever any board of supervisors without authority of law order any money paid out of the county treasury for salary, fees, or for any other purpose, such supervisors and the party or parties in whose favor such order shall have been made shall be responsible for all such sums of money and twenty per cent additional

thereon: . . . providing that any supervisor may relieve himself from responsibility by dissenting from such order and having his dissent entered on the minutes of the board at the time." The provisions of the statute as quoted have unquestionably made the office of the probate judge a salaried one, and require him to collect in advance all fees legally chargeable for his services, and to pay into the county treasury all fees received by him. It was held by the lower court, on substantial evidence, that the said J. S. Wood as said probate judge was, at the time the allowance in question was made, indebted to the county, both for fees collected and not paid in, and for fees that were not collected by him in advance, as was made his duty by the statute; and the act of the seventeenth legislature amending paragraph 383 of the Revised Statutes has definitely fixed, and very plainly stated, the liability of supervisors and claimants under these circumstances. The construction and effect of this act were fully considered in the case of *Avery v. Pima County*, ante, p. 26, 60 Pac. 702. The judgment of the lower court is affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 745. Filed March 21, 1901.]

[64 Pac. 443.]

PHENIX WHOLESALE MEAT COMPANY, Defendant
and Appellant, v. F. B. MOSS, Plaintiff and Appellee.

1. **APPEAL AND ERROR—SUPREME COURT—JURISDICTION—AMOUNT INVOLVED—RECOVERY—REV. STATS. ARIZ. 1887, PAR. 593, CITED.**—Under the statute, *supra*, providing that the supreme court shall have jurisdiction to review upon appeal a judgment in an action or proceeding commenced in the district courts when the matter in dispute exceeds two hundred dollars, an appeal by the defendant from a judgment in favor of plaintiff for one hundred and thirty-four dollars, though suit was brought for three hundred and twenty-four dollars, will not lie, the defendant seeking no affirmative relief.
2. **SAME—SAME—SAME—SAME—TAXATION—PAYING INSPECTOR FOR TAGGING HIDES NOT—REV. STATS. ARIZ. 1887, PAR. 592, 593, AND LAWS ARIZ. 1897, ACT NO. 6, SEC. 39, CITED.**—Paragraphs 592 and

593, *supra*, provide for appeal to the supreme court from a district court when the amount in controversy exceeds one hundred dollars, when the legality of any tax, toll, impost, or municipal fine is in question, or the amount in controversy exceeds two hundred dollars. Act No. 6, section 39, *supra*, makes it the duty of the inspector to inspect all animals slaughtered for sale in his district and place a tag on every hide so inspected, for which inspection the butcher must pay twenty-five cents a hide. An appeal will not lie on behalf of defendant from a judgment for one hundred and thirty-four dollars for inspections made, as the services required are intended for the protection both of the butcher and the public, and the fees cannot be considered either a tax, toll, impost, or municipal fine.

COMPARE: *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Appeal dismissed.

Thomas Armstrong, Jr., for Appellant.

C. F. Ainsworth, for Appellee.

DAVIS, J.—On the seventh day of November, 1899, F. B. Moss brought an action in the district court of Maricopa County against the Phoenix Wholesale Meat Company, a domestic corporation, to recover the sum of \$324, as statutory compensation alleged to be due him for services as a live-stock inspector in the inspection and tagging of 1,296 hides from animals slaughtered by the defendant company between the dates of March 27 and September 1, 1899. The defendant filed no counterclaim, and asked no affirmative relief. The cause was tried before a jury, which returned a verdict in the plaintiff's favor for the sum of \$134. The court rendered a judgment upon the verdict, and the defendant seeks to have it reviewed upon appeal.

It is objected to our consideration of the appeal that the amount involved is not sufficient to bring it within the jurisdiction of the supreme court. The action was commenced in the district court. It can be reviewed here (1) if "the matter in dispute exceeds \$200"; or (2) if "the legality of any tax, toll, or impost, or municipal fine is in question." Rev. Stats., pars. 592, 593. It must be obvious that, as to the defendant, the "matter in dispute" here is the exact amount of the recov-

ery against him in the lower court. On his part there is nothing in controversy, so far as the amount is concerned, beyond the sum for which the judgment was given, and that is not sufficient to entitle him to an appeal to this court. It was held by the supreme court of the United States in *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688, involving a similar question, that on an appeal by the defendant the sum of the judgment against him governs the jurisdiction when no affirmative relief is asked. Mr. Chief Justice Waite, in delivering the opinion of the court in that case, said: "It has always been assumed, since *Cooke v. Woodrow* (5 Cranch, 13, 3 L. Ed. 22), that when a defendant brought a case here the judgment or decree against him governed our jurisdiction, unless he had asked affirmative relief which was denied; and this because, as to him, jurisdiction depended on the matter in dispute here. If the original demand against him was for more than our jurisdictional limit, and the recovery for less, the record would show that he had been successful below as to a part of his claim, and that his object in bringing the case here was not to secure what he had already got, but to get more. As to him, therefore, the established rule is that, unless the additional amount asked for is as much as our jurisdiction requires, we cannot review the case."

It cannot be contended that the action at bar involves any question of the legality of a "tax, toll, or impost, or municipal fine." The plaintiff's recovery was in the nature of fees or compensation allowed to him as a public officer for the performance of a duty required by law. The statute which imposes upon the live-stock inspector that duty also provides that he "shall receive as compensation therefor the sum of twenty-five cents for each hide of horned or neat cattle inspected or tagged, to be paid by such butcher." Sec. 39, act No. 6, Laws 1897. The service required by this statute to be performed was intended for the protection both of the butcher and the public, and its reasonable recompense can in no just sense be considered either a tax, toll, impost, or municipal fine. We have, therefore, no jurisdiction over the matter in dispute in this case, and the appeal will be dismissed.

Sloan, J., and Doan, J., concur.

[Civil No. 746. Filed March 21, 1901.]

[64 Pac. 434.]

J. M. WARD, Plaintiff and Appellant, v. MOSES H. SHERMAN et al., Defendants and Appellees.

1. **APPEAL AND ERROR—ASSIGNMENT OF ERRORS—MUST BE SPECIFIC—** MARKS v. NEWMARK, 3 ARIZ. 224, 28 PAC. 960; CHRISTY v. ARNOLD, 4 ARIZ. 263, 36 PAC. 918; MAIN v. MAIN, ANTE, P. 149, 60 PAC. 888, FOLLOWED—SUPREME COURT RULES 3 AND 6 CITED.—Under supreme court rules Nos. 3 and 6, requiring that a specification of the errors relied upon must be particularly and separately stated, and that all assignments of errors must distinctly specify each ground of error relied upon and the particular ruling complained of, appellant's assignment of errors stating that the court erred in admitting evidence and in rejecting evidence, that the evidence did not sustain the judgment, finding, or verdict, and that the judgment was contrary to the law and evidence, is too general and indefinite for consideration, and, no error appearing upon the face of the record, the judgment must be affirmed. REVERSED. 192 U. S. 168; 48 L. Ed. 391.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

Kibbey & Edwards, and E. J. Edwards, for Appellant.

C. F. Ainsworth, Frank Cox, and C. N. Sterry, for Appellees.

PER CURIAM.—The brief of the appellant in this case contains the following assignment of errors: “(1) The court erred in admitting evidence adduced by the defendant. (2) The court erred in rejecting evidence offered by the plaintiff. (3) The evidence does not sustain the judgment, findings, or verdict of the court. (4) The evidence does not sustain the findings of the court. (5) The judgment of the court is contrary to the law. (6) The judgment of the court is contrary to the evidence.” The rules of this court (rule 3, 4 Ariz. ix, 35 Pac. vi) require “a specification of the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error

alleged is to the admission or the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. . . . When the error alleged is to the finding of the court, the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding." It is further prescribed (rule 6, 4 Ariz. xi, 35 Pac. vii) that "all assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. . . . An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided." There is objection made by counsel for the appellee to the consideration of the assignment of errors in this case on the ground that the same does not conform to the requirements of the statute and the rules of the court. The objection is well founded. The errors assigned are but general and indefinite. They point us to nothing specific, and utterly fail to comply with the express provision of our rules. This court is an appellate one, and the prime object of these rules is the designation of specified errors, in order that the court and opposite counsel may be clearly informed of what particular ruling or action below is relied upon for the reversal or modification of the judgment. An assignment which does not distinctly point out these matters,—one which compels the court and counsel to look further, and to search the brief and record, in order to discover them,—entirely fails to accomplish the purpose of its being. Not one of the errors here alleged is sufficiently specific to be entitled to consideration. General assignments, substantially in the form here presented, have been condemned and held insufficient under the former decisions of this court, and likewise by other courts operating under similar rules. *Marks v. Newmark*, 3 Ariz. 224, 28 Pac. 960; *Christy v. Arnold*, 4 Ariz. 263, 36 Pac. 918; *Main v. Main*, ante, p. 149, 60 Pac. 888; *Treat v. Jemison*, 20 Wall. 652, 22 L. Ed. 449; *United States v. Indian Grave Drainage Dist.*, 29 C. C. A. 578, 85 Fed. 928; *Louisiana, A. and M. R. Co. v. Board of Levee Commrs.*, 31 C. C. A. 121, 87 Fed. 594; *Chandler v. Pomeroy*, 37 C. C. A. 430, 96 Fed. 156; *Percy Mining Co. v. Hallam*, 22 Colo. 233, 44 Pac. 509; *Schofield v. Territory*, 9 N. M. 256, 56 Pac. 306. The rules relating to assign-

ments and specifications of error have been so long in force, and we have so often decided that a failure to make proper assignments amounts to a waiver of all errors which are not fundamental, that it would seem there should be no longer occasion for disregard of these plain requirements. In the absence of any assignment of error in this case, and none appearing upon the face of the record, the judgment must be affirmed.

[Civil No. 747. Filed March 21, 1901.]

[64 Pac. 425.]

CHARLES GOLDMAN, as Administrator of the Estate of
M. Wormser, Deceased, Defendant and Appellant, v. T.
L. SHULTZ, Plaintiff and Appellee.

1. APPEAL AND ERROR — CONTRACT — VERBAL — FOR COMMISSION — EVIDENCE — FINDINGS OF FACT — WILL NOT BE DISTURBED ON APPEAL IF ANY EVIDENCE TO SUPPORT — MAIN v. MAIN, ANTE, P. 149, 60 PAC. 888; JOHNSON v. CUMMINGS, ANTE, P. 60, 60 PAC. 870; HENRY v. MAYER, 6 ARIZ. 103, 53 PAC. 590, FOLLOWED. — In a suit on a verbal contract to recover commission for having negotiated a lease of certain property a finding that plaintiff is entitled to a commission of one third of the rent received will not be disturbed on appeal, there being some evidence to support it.
2. BROKERS — COMMISSION — FORECLOSURE — AMOUNT BID AT SALE — MEASURE OF COMMISSION — RENTAL. — Plaintiff negotiated the lease of lands belonging to Wormser, under a verbal contract, providing that he was to receive as his commission one third of the rent per annum. The lessees being \$17,500 in default for rent, defendant foreclosed his landlord's lien on a growing crop on the premises for the arrears in rent, and purchased it at foreclosure sale for one thousand dollars. Subsequently defendant sold the crop for \$12,500. Plaintiff brought suit to recover one third of this \$12,500 paid defendant, claiming that it was part of the balance due on the rent. *Held*, that as the foreclosure sale was made under a judgment against the lessee for the unpaid rental, the one thousand dollars paid should be credited upon the judgment against the lessee for rent, and to that extent was a payment of rent, and plaintiff was entitled to one third of that amount, but that upon the sale the defendant became the absolute owner of the crop, and plaintiff had no further interest therein.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Modified and affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellant.

Thomas D. Bennett, for Appellee.

DOAN, J.—This action was brought in the district court of Maricopa County by the appellee as plaintiff against the appellant as defendant. The complaint alleged that during his lifetime M. Wormser, by a verbal contract with the plaintiff, entered into about the 10th of July, 1895, agreed that the plaintiff should negotiate the rental of certain lands belonging to Wormser in Maricopa County, and, in consideration of his services in the leasing of the said premises at the agreed price of three dollars per acre per annum, plaintiff was to be paid and should receive, out of the rental paid thereon, one dollar per acre per annum while said rental continued, unless the said land should be sold through the efforts of the plaintiff. The option granted for the sale of the lands having expired before the trial of this case in the lower court, the appellee elected on the trial to take simply his commission on the rental, and asked that his claim be allowed in that way. The provisions in the pleadings and the statements in the testimony, therefore, relative to the contemplated sale of the land will not be of interest in the consideration of the case here, and will be omitted from the further statement. The complaint alleged, further, that, pursuant to said contract, plaintiff rented for Wormser to J. H. Carruthers about sixteen hundred acres of land, as described in the several leases produced in evidence and appearing in the record; that the whole amount of rentals already paid on account of said leases was the sum of ninety-six hundred dollars for two years' rental, of which sum there would be due plaintiff the sum of thirty-two hundred dollars; that the amount due on said rentals that had not been collected, but for which the estate held security, was twelve thousand five hundred dollars, with interest, of which plaintiff was entitled to commissions amounting to one third thereof; wherefore plaintiff prayed

that his claim be allowed for commissions on the rental of said lands at the rate of one dollar per acre per annum during the time said lands were leased to Carruthers or assigns, contingent upon the collection of the rentals agreed upon.

The facts as established by the evidence and found by the court were substantially as follows: About the first day of July, 1895, M. Wormser, by contract with the plaintiff, agreed that plaintiff should negotiate the rental of certain lands belonging to Wormser, in Maricopa County, and, in consideration of his services in the leasing of said premises at the agreed price of three dollars per acre, the plaintiff, Shultz, should receive one dollar per acre out of every three dollars collected by Wormser; or, in other words, one third of the rental paid by Carruthers or his assigns was to be paid by Wormser to Shultz for procuring the lease. Through plaintiff's negotiations, about sixteen hundred acres of land were leased to Carruthers, at three dollars per acre per annum, and several leases were drawn describing the land and specifying the terms. After Carruthers secured the lease from Wormser, in 1895, he and the Canaigre Company, of which he was general manager, entered into possession of the premises, and planted thereon a large acreage of canaigre. The last lease, executed in 1897, provided that if default be made in payment of the rental, or any part thereof, when the same should become due, it should be proper for the lessor to re-enter the premises, and that the lessor should have a lien upon the crops grown upon the leased premises to secure the rental, and might cause such crops to be seized, if necessary, to pay any rent due and unpaid. Wormser died on the twenty-fifth day of April, 1898, and Goldman was appointed administrator of the estate on the ninth day of May, 1898, and has been ever since acting as such administrator. Before Wormser died, he received from Carruthers or his assigns, as rental on said lands, seventy-two hundred dollars. After Goldman was appointed administrator, he received as rental on said lands twenty-four hundred dollars, and \$368.58 interest thereon, which was due under the terms of the lease. In 1899 the lessee, and the Canaigre Company, of which he was general manager, were in arrears on the rental, and suit was instituted by the administrator of the estate for possession of the premises and the foreclosure of the landlord's lien on the crop.

Upon the trial, judgment was rendered against the lessee and assigns for \$17,577, and for the foreclosure of the landlord's lien on the canaigre then growing on the land. The canaigre was afterwards sold at sheriff's sale in satisfaction of the above judgment, and Goldman, as administrator, bid it in for the nominal sum of one thousand dollars, and credited the judgment debtors with that amount on the judgment. Afterwards Goldman sold the canaigre that had been purchased at sheriff's sale, under the judgment aforesaid, to some California parties for twelve thousand five hundred dollars, and paid the plaintiff, Shultz, five hundred and fifty dollars commission for effecting the sale. Of this amount, at the time of the trial, six thousand dollars had been paid, and the balance was being paid in monthly installments. No portion of any of the rentals collected had ever been paid to Shultz, who afterwards presented a claim against the estate for one third of ninety-six hundred dollars that had been paid, and for one third of the twelve thousand five hundred dollars for which the canaigre that had been purchased at the sheriff's sale, under judgment against the lessee, had been afterwards sold to the California parties, and on disallowance by the administrator brought this suit.

From these facts, the court held as conclusions of law: That Shultz was entitled to one third of the cash payments that had been made to Wormser and Goldman; that he was also entitled to one third of the net amount realized by the administrator from the sale to the California parties of the canaigre purchased from the sheriff under the judgment of the estate against the lessee and assigns for the unpaid rent, the judgment for the one third of the amount yet uncollected on that sale to be contingent on the collection thereof; that the amount thus due him from the administrator on the cash payments that had been made to Wormser and Goldman was the sum of \$3,322.83; that the amount due from the sale by Goldman of the canaigre was the sum of \$3,983.33, of which sum \$1,816.16 was due absolutely, and \$2,166.66 was contingent upon the collection of the sixty-five hundred dollars yet unpaid. From the judgment rendered in accordance with these findings, and the denial of a motion for a new trial, the defendant appeals, and assigns as errors—1. That the court erred in finding as a fact that Shultz was to receive one dollar

per acre out of every three dollars collected by Wormser; 2. That the court erred in finding that Shultz was entitled to one third of the cash payments made to Wormser and Goldman; 3. That the court erred in finding that Shultz is entitled to one third the net amount realized on the sale by the administrator to California parties of the canaigre purchased under judgment against the lessee; 4. That the court erred in rendering judgment for appellee in the sum of \$5,139.49 and interest absolute, and the further sum of \$2,166.66 contingent, or for any greater sum than at the rate of one dollar per acre for the whole number of acres rented.

While the testimony in regard to the verbal contract between Shultz and Wormser is not entirely satisfactory, it does present some evidence tending to establish the construction of the contract given by the court. The rule of this court, that the findings of the trial court, when supported by evidence, will not be disturbed on appeal, has been uniformly adhered to. *Main v. Main*, ante, p. 149, 60 Pac. 888; *Johnson v. Cummings*, ante, p. 60, 60 Pac. 870; *Henry v. Mayer*, 6 Ariz. 103, 53 Pac. 590; *Webber v. Kastner*, 5 Ariz. 324, 53 Pac. 207. The determination of this question sustains the finding next presented, "that Shultz was entitled to one third of the cash payments made to Wormser and Goldman."

Shultz was not, however, entitled to one third of the net amount realized by the administrator from the sale of the canaigre to the California parties. Goldman, as administrator, purchased the canaigre at sheriff's sale for one thousand dollars. That sale was made under a judgment of the court against the lessee and his assigns for the unpaid rental. The proceeds of the sale were a satisfaction to that extent of the judgment. The one thousand dollars paid was credited upon the judgment against the lessee for rent, and to that extent was a payment of rent, and Shultz was entitled to one third of this amount whether Goldman or the estate afterwards realized anything from the canaigre or not. Upon the sale, Goldman, as administrator, became absolute owner of the canaigre, and it is immaterial what disposal he made of it. By its sale, Carruthers having thereby paid one thousand dollars of the rental, Shultz, being entitled to one third of the rent collected, became at once entitled to one third of the one thousand dollars thus paid by Carruthers by the sale of the

canaigre, whether Goldman or the estate ever realized anything from it or not. If Goldman, as administrator, had undertaken to dig, prepare, and ship the canaigre, and the expenses had been more than the receipts, so that the purchase had proven an entire loss, the judgment against Carruthers would still be credited with one thousand dollars, for which Goldman, as administrator, had purchased the property, and Shultz would be entitled to one third of that amount as commission. The amount credited upon the judgment debt, being the amount paid on the rental under the lease, is for that reason the measure of the commission to which Shultz is entitled. That was one thousand dollars, and of that amount he is entitled to one third.

The judgment should have been given for \$333.33, being one third of the one thousand dollars paid by Goldman, instead of \$3,983.33, given as one third of \$11,950, the amount for which the administrator sold the canaigre, after deducting five hundred and fifty dollars paid to Shultz as commission for effecting the sale. This amount, added to \$3,322.83 due on the cash payments that had been made to Wormser and Goldman, would aggregate \$3,656.16. The judgment will be modified in this respect. No errors appearing except as above noted, the case will be remanded to the district court, with instructions to modify the judgment for the plaintiff, in conformity with the views herein expressed, by substituting \$3,656.16 for \$5,139.49 as the amount of the absolute judgment, and eliminating therefrom the contingent judgment for the further sum of \$2,166.66; and it is so ordered.

Sloan, J., and Davis, J., concur.

[Civil No. 748. Filed March 21, 1901.]

[64 Pac. 433.]

CHARLES GOLDMAN, Administrator of the Estate of M. Wormser, Deceased, Plaintiff and Appellant, v. JERRY MILLAY, Defendant and Appellee.

1. PARTITION—PARTIES DEFENDANT—REV. STATS. ARIZ., PAR. 2394, CITED.

—In an action by the mortgagee of an undivided one half of a library for partition against purchaser of the other undivided one half, alleging that said purchaser was in exclusive possession, where it appears that the defendant held possession of only an undivided one half, and the widow of the mortgagor held possession of and claimed title to the other undivided one half, the widow is the real party in interest, and she not having been joined as party defendant, there was a defect of parties defendant, and there was no error in the court entering judgment for the defendant.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellant.

Kibbey & Edwards, for Appellee.

DOAN, J.—This action was brought in the district court of Maricopa County on the twenty-fourth day of February, 1900, by the appellant, Charles Goldman, as administrator of the estate of M. Wormser, on a complaint alleging that a part of the estate of M. Wormser consisted of an undivided one-half interest in and to certain law-books and personal property therein described; that, as administrator of said estate, plaintiff was entitled to possession of an undivided one-half interest of the said law-books and personal property; that the said law-books were in the exclusive possession of the defendant, Jerry Millay; that the defendant had applied to said Millay to admit the plaintiff to a joint and equal use and possession of, and to make a joint and equitable apportionment and division of, the said books and property between plaintiff and defend-

ant, all of which had been denied and refused by the said defendant. Wherefore plaintiff prayed for a partition of the said books and property, and that the plaintiff be placed in possession of that part to the possession of which the court should find him entitled. The defendant denied that the property was a part of the said Wormser estate, denied that he was in exclusive possession thereof, and alleged that he, with one Frank Stewart Williams, as co-owner, were in possession of the library in controversy; that he was the owner of one undivided one half of the said property, and the said Frank Stewart Williams was the owner of the other undivided one half. Upon the trial of the case the evidence established that on the nineteenth day of July, 1897, M. H. Williams, the owner of a law library, executed a chattel mortgage on an undivided one-half interest therein to M. Wormser to secure a note of that date executed by himself and one J. C. Kellam for \$836, payable to Wormser on July 1, 1898. About the same time he mortgaged the other undivided half of the same library to one W. T. Smith. The date of the Smith mortgage, with the amount secured by it, does not appear in the record. On the 25th of April, 1898, Wormser died; and on the 9th of May, 1898, Charles Goldman was appointed administrator of the Wormser estate, and the mortgage and note from Williams to Wormser came into the hands of Goldman as such administrator. Some time after the death of Wormser, Williams died, and it does not appear that there has been any administration of his estate. After the death of Wormser, the library upon which the two mortgages mentioned had been given was found in the possession of Judge J. H. Kibbey, who was holding such possession for Mrs. Frank Stewart Williams, as her attorney. While the books were in the possession of Judge Kibbey, acting as the attorney of Mrs. Williams, who claimed to own them, Jerry Millay proposed to buy the library. Millay was aware of the two mortgages. Mrs. Williams admitted the validity of the Smith mortgage, but disputed the Wormser mortgage,—whether denying the validity of the mortgage, or the amount of the indebtedness claimed thereunder, does not appear. In this situation, Millay proposed to buy from Mrs. Williams the library then in her possession, upon the release of the mortgages. Millay paid to Smith three hundred dollars in satisfaction of the Smith mort-

gage. The books were then delivered by Kibbey, as Mrs. Williams's agent, to Millay, upon his agreement to take possession of the undivided one half that had been mortgaged to Smith, and to hold joint possession with Mrs. Williams of the library until the determination of the controversy relating to the Wormser-Williams debt and mortgage, and to pay Mrs. Williams two dollars per month rental for the undivided one half thus in dispute until that time, and then to pay the three hundred dollars to whomsoever might be determined to be entitled to it. After this transaction, in February, 1900, while the books were in possession of Millay under this condition of affairs, Goldman brought this action. The case was tried to the court, and after the introduction of the evidence and the presentation of the argument, judgment was rendered that, the plaintiff having failed to prove the facts alleged in his complaint, he should take nothing by his suit, and that the defendant have his costs. From this judgment, and the denial of a motion for a new trial, the plaintiff appeals, and assigns as errors: 1. That the court erred in holding that a mortgagee of an undivided half interest in chattels, after default and condition broken, is not entitled to bring an action for partition of the mortgaged property; 2. That the court erred in holding that the mortgagee of chattels, after default and condition broken, is not the owner of the property, until there has been a foreclosure of the mortgage; 3. That the court erred in refusing to give judgment to the plaintiff for partition of the mortgaged property; 4. That the court erred in giving judgment for the defendant in the case.

The third assignment is the only one that need be taken under consideration on this appeal. An examination of the record does not disclose any ruling by the lower court on the questions presented in the first two assignments. It does not appear from an investigation of the record that these questions were determined by the lower court in its disposal of the case. The court simply decided that the plaintiff had failed to prove the facts alleged in his complaint, and therefore should take nothing by his suit. The allegation that the books were in the exclusive possession of the defendant Millay, and that plaintiff had applied to said Millay to be admitted to a joint use and possession, and had been refused, was not sustained by any evidence on the part of the plain-

tiff. The defendant established by undisputed evidence that he only held possession of the undivided one-half interest in the property that had been mortgaged to Smith, and that Mrs. Williams claimed title to and held possession of the undivided one-half interest claimed by the plaintiff, and that no demand to be admitted to joint use and possession of the property had been made by the plaintiff, or refused on his part. It appears from the record that the evidence thus far fully sustained the judgment. The allegation as to the title to the property has not yet been determined, but the showing made under the evidence differs very materially from the allegation in the complaint that part of the Wormser estate consisted of the property in question. In order to establish that allegation, it must be assumed by the court or proven by the plaintiff that Williams gave a valid mortgage on the property; that he defaulted in the payment of the debt, and the title passed to the mortgagee. There was a question raised as to the validity of the chattel mortgage as to third parties, but there does not appear to have been any ruling by the court upon that point, and the question is not presented here. The point that is decisive of this appeal is that while the complaint alleged that the undivided one half of the library constituted a part of the Wormser estate, and that Millay had exclusive possession thereof, the answer set up, and the evidence fully established, that Millay held possession of only one undivided one half, and that Mrs. Williams held possession of and claimed title to the undivided one half which was claimed by the plaintiff, and that Mrs. Williams, the real party in interest, was not made a party to the suit, and a judgment could not be given in plaintiff's favor without affecting her interests. The Revised Statutes provide, in paragraph 2394, that suits for partition shall be commenced in the same manner as other civil suits are commenced, and the several owners or claimants of the property shall be summoned as in other cases. In a suit for partition of property held by tenants in common, the interests of all the cotenants in the subject-matter of the suit are so bound up together that their legal presence as parties defendant, if they have not joined in the petition, is an absolute necessity, without which the court cannot proceed. *Barney v. City of Baltimore*, 6 Wall. 284, 18 L. Ed. 825. This is put upon the

ground that no court can adjudicate directly upon a person's rights without the party being actually or constructively before the court. It was held in *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158, that "a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights." In this case the plaintiff has no right separable from and independent of the rights of Mrs. Williams, who has not been made a party to the suit. The possession of the undivided one half of the books claimed by the plaintiff could not be given without directly affecting or prejudicing her right of possession that she was then exercising, or determining the title she was claiming to the property in question. In order to enable the court to adjudicate the rights of the adverse claimants of the title and possession, it is necessary that both should be in court. Under these circumstances, there was no error in the court "refusing to give judgment to the plaintiff for partition of the mortgaged property." The judgment of the lower court is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 752. Filed March 21, 1901.]

[64 Pac. 435.]

THE SUN DANCE GOLD MINING COMPANY, a Corporation,
et al., Defendants and Appellants, v. A. C. FROST,
Plaintiff and Appellee.

1. TRUSTS — RESULTING TRUST — FRAUD — PLEADING.—F. and D., who lived in Chicago, became joint purchasers of certain mining property in Arizona, the deed being placed in escrow in Prescott, in the name of F. for the benefit of both, said deed containing a forfeiture clause on the non-payment of any of the installments of the purchase price by F. Thereafter a corporation was formed to own and operate the mine, and an agreement was entered into

whereby F. was to transfer the mining property to the corporation and receive in payment therefor a certain amount of stock issued to himself and D. Shortly before a certain payment became due, D. went to Arizona, F. paying half the expense of the trip, for the purpose of becoming thoroughly acquainted with the property in order to more effectually sell the stock. D. agreed to make the next payment when it fell due, or to notify F. in time for him to do it. Upon his arrival in Arizona, D. represented that F. was irresponsible and had no intention of completing the purchase. He then secured an agreement from the owner of the property that it was to be conveyed to him upon the same terms, provided F. failed to make the payment. D. then notified F. that he had secured an extension of time for the payment. After default in payment, D. secured and transferred the property to the defendant corporation, which had full knowledge of the facts, and received therefor the stock which should have been issued to himself and F. In an action by F. to recover from D. and the corporation the value of the stock which should have been issued to him, *held*, that a complaint setting out the above facts stated a good cause of action, and a demurrer thereto was properly overruled.

2. SAME—SAME—SAME—SAME—FRAUD NEED NOT BE ALLEGED IN ACTION AGAINST TRUSTEE FOR APPROPRIATING PROPERTY OF CESTUI QUE TRUST.—Where F. and D. were jointly interested in the purchase of certain mining property and its transfer to a corporation for stock therein, and D. secured the issuance of all the stock to himself, to the exclusion of his co-owner and partner in the transaction, the fiduciary relations existing between F. and D. render it unnecessary for F. to allege and prove actual fraud in an action to recover from D. the value of the stock which should have been delivered to him.
3. SAME—SAME—SAME—CORPORATION—LIABLE TO CESTUI QUE TRUST WHERE IT TRANSFERS HIS PROPERTY TO TRUSTEE WITH NOTICE OF FRAUD.—Where F. and D. were jointly interested in the purchase of certain mining property and its transfer to a corporation for stock therein, and D. secured the issuance of all the stock to himself to the exclusion of his co-owner and partner in the transaction, by certain fraudulent acts, and the corporation had full knowledge of the whole transaction, *held*, that the corporation by so transferring the stock to D. rendered itself liable to F. for the value of his share thereof.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

E. M. Sanford, for Appellants.

This case is not within the doctrine of resulting trusts, for Frost paid nothing on account of his stock. *Bland v. Talley*, 50 Ark. 71, 6 S. W. 235.

Fiduciary relations must result from the original contract. It cannot result from matter *ex post facto*. It is clear that it must arise out of facts and circumstances as distinguished from a mere parol promise or contract or a mere non-payment of the consideration of the Frost option. *Lovett v. Taylor*, 54 N. J. Eq. 311, 34 Atl. 898; *Boying v. Cheeseborough* (N. J.), 36 Atl. 900.

So where one agrees to purchase real property or personal property and give another an interest in it, and he purchases and pays his own money, no trust can result. *Levy v. Evans*, 57 Fed. 683.

Kretzinger, Gallagher & Rooney, for Appellee.

The community interest and partnership relation existing between Davies and Frost rendered it legally impossible for Davies to go behind the back of Frost and secure a new option in his own name for his sole benefit. His attempt to do so did not in equity work a change of the legal situation of the escrow agreement or the rights of the parties with respect thereto, but left wholly unaffected the half-interest of each in the property, Davies becoming a trustee to the extent of the half-interest owned by Frost. *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Yoemans v. Lasley*, 50 Ohio St. 200; *Hulett v. Fairbanks*, 40 Ohio St. 244; *Van Horn v. Fonda*, 5 Johns. Ch. 407; *Rothwell v. Dawes*, 2 Black (U. S.) 613; *Müller v. O'Boyl*, 89 Fed. 140; *Bennett v. Austin*, 81 N. Y. 322; *Jones v. Dexter*, 130 Mass. 380, 39 Am. Rep. 459, and note.

Under the strictest definition, Davies sustained a fiduciary relation to Frost in this transaction. Frost reposed confidence in his good faith. He relied upon his promise in going to Prescott. A fiduciary relation exists "wherever a trust, continuous or temporary, is especially reposed in the skill or integrity of another, or the property or pecuniary interest, in whole or in part, or the bodily custody, of one person is placed in charge of another." *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067; *Fulton v. Whitney*, 66 N. Y. 548; *Ringo*

v. *Bines*, 10 Pet. 269; *O'Connor v. Irvine*, 74 Cal. 439, 16 Pac. 236; *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252.

DOAN, J.—This was an action brought in the district court of Yavapai County by A. C. Frost, of Chicago, against L. A. Davies, of Chicago, and the Sun Dance Gold Mining Company, an Arizona corporation, then operating the Silver Traill and W. E. Thorne gold mines in Yavapai County, Arizona. The complaint sought to compel the defendants to pay to the plaintiff the reasonable and market value of two hundred thousand shares of the capital stock of the Sun Dance Gold Mining Company, and to have the amount found due to the plaintiff to be adjudged a first and prior lien upon the Silver Traill and W. E. Thorne mines. The complaint was demurred to by the defendants, and the demurrer was overruled. After hearing and argument, a decree was rendered that the plaintiff recover from Davies and the Sun Dance Gold Mining Company \$11,435.94, being the value of two hundred thousand shares of stock in that company. From this judgment, and the denial of a motion for a new trial, the defendants appeal, and assign as errors: 1. That the court erred in overruling the demurrer of defendants to the amended complaint; 2. That the findings of the court are not supported by the allegations of the complaint and the law; and 3. That the court erred in its conclusions of law,—giving under each assignment definite specifications wherein the alleged errors were committed. The transcript of the evidence has not been furnished to this court, but the facts of the case as expressed in the findings of the lower court, and as recognized and practically admitted in the pleadings, are substantially these: Early in December of 1895 the plaintiff, A. C. Frost, while in Yavapai County, Arizona, met one A. J. Pickrell, the owner of the Silver Traill and W. E. Thorne mining claims, and obtained two reports thereon, and returned with them to Chicago. After his arrival in Chicago, the attention of Davies was called to the property, and on January 23, 1896, Frost and Pickrell entered into an agreement in writing, by the terms of which a deed to the property was placed in escrow in the Prescott National Bank, to be delivered on the payment of the purchase price of twenty thousand dollars in the amounts and on the dates therein specified,

with the usual forfeiture clause. After this, on February 12th, Frost and Davies entered into an agreement whereby they should jointly meet the payments; Davies should secure purchasers for the property, and he and Frost divide equally the profits realized on the sale thereof. This was a verbal agreement, with a memorandum of the terms expressed in a letter from Frost to Davies, produced in evidence on the trial. The first payment under this escrow agreement fell due on the 15th of February. At that time Frost and Davies sent a joint letter to one Dr. Vickers, in Prescott, wherein they each inclosed five hundred dollars, and dictated a different escrow agreement, changing the dates and the amounts of the remaining partial payments, and asked that this be substituted for the original agreement, and authorized Vickers to sign their names to the second agreement. This was done, the second agreement was duly signed by Pickrell, and the one thousand dollars accepted, and Frost's name was signed by Vickers, who explained that through an oversight Davies's name was not signed, but that the deal was made in his as well as in Frost's interest; and it was understood by Frost and Davies that Frost held the property for himself and Davies in accordance with their agreement for its joint purchase and disposal. In pursuance of this agreement, Frost and Davies caused the incorporation of the Sun Dance Gold Mining Company, with a capital stock of one million dollars, divided into one million shares of one dollar each. Frost and Davies and three other persons were elected as a board of directors. Davies was elected president of the company, and Frost secretary. At a meeting of this board of directors on March 6, 1896, it was agreed between Frost, acting for himself and Davies, and the Sun Dance Gold Mining Company, acting by its board of directors, that Frost should convey to the said company the said Silver Traill and W. E. Thorne mines in consideration of all of the capital stock of the company; that, in consideration of the company's repaying to Frost all the expenses he had incurred relative to the property, he was to transfer to the company two hundred thousand shares of stock, the proceeds of which should be used in the operation of the property, that four hundred thousand shares should be sold at five cents per share, and the proceeds applied to the payment of the amount remaining due to Pickrell, for the

purpose of securing the title; and that the other four hundred thousand shares should be issued to Frost and Davies as their property severally. The company and all its officers and directors had full knowledge of all the terms of this agreement, including the exact price Frost and Davies had agreed to pay Pickrell for the mining property, and the amount they were to receive as their respective profits on the consummation of the deal. After the completion of this arrangement, Davies left Chicago on March 9, 1896, for Arizona, for the ostensible purpose of examining the property, in order that he might personally vouch for its merits to persons whom he might interest in the stock. Davies, before leaving Chicago, represented to Frost that in case the second payment of two thousand dollars, due March 15th, should become due during his absence, he would either give to the owner his check for the amount, or telegraph Frost in ample time for him to make the remittance. The expense of Davies's trip to Arizona was estimated by him and Frost at one hundred and twenty-five dollars, and Frost advanced one half of this sum to Davies upon his departure from Chicago, and likewise gave him a letter of introduction to the owner of the property, stating that he was the president of the company recently organized for the purpose of buying and operating the property; that the object of his visit was to inform himself, for the benefit of the company, as to the existing conditions at the mine, and to determine what improvements might be necessary to accomplish the best results; and asked Pickrell to give him any information and extend any favors and courtesies that he might be able. Davies, upon his arrival in Prescott, represented to Vickers and Pickrell that Frost had no ability or intention to carry out the escrow agreement; that he (Davies) had contributed the payment already made; and on March 12th—three days before the date for the next payment under the Frost option—induced Pickrell to make another agreement with him personally, which provided that, if the payment under the Frost agreement be not made as required by its terms, Pickrell should execute to Davies a deed duplicate in description of the property, and upon the payment by Davies of any balance remaining unpaid under the Frost agreement, after crediting to Davies all payments previously made on the purchase price, would deliver said

deed to Davies, provided Davies should deliver to him, in excess of the purchase price, five thousand shares of the said company's stock. After securing this agreement, Davies at once returned to Chicago, and for some ten days concealed from Frost the execution of the last agreement. Upon representing to Frost that he had secured from Pickrell a short extension, and could sell the stock in ample time to meet the second payment, he obtained from Frost the stock certificates and book, seal, and other papers of the company, and by the use of the stock certificates thus obtained he procured two thousand dollars by the sale of stock on March 21, 1896, and remitted the same to Pickrell, whereupon the formal deed transferring the mining properties to Davies alone was placed in escrow under and in pursuance of the agreement secured by Davies from Pickrell on March 12th. Davies then told Frost that he could not raise any money on the stock, and that their option was lost. Davies was still in possession of the seal, stock certificates, and books of the corporation, and soon afterwards Frost was displaced as an officer and director of that company, and the conveyance of the property was made by Davies to the company, in consideration of which two hundred thousand shares of stock were put into the treasury for development and operation of the property, four hundred thousand shares were sold to complete the purchase and pay Pickrell, and four hundred thousand shares were issued to Davies as his personal stock, and were received and retained by him. The company issued these four hundred thousand shares of stock to Davies for his personal use with the full knowledge of the facts heretofore stated. The company failed to transfer any stock to Frost. Davies failed and refused to transfer any stock to Frost, or to pay any of the expenses incurred by Frost in the examination and procurement of the property, or to return the one half of the first payment theretofore made by Frost. At the time of the issuance of the four hundred thousand shares to Davies, and for some time thereafter, and at the beginning of this suit, the stock was of the value of 4½ cents per share. Neither Davies nor the company paid anything to Frost for his interest in the property or his services or expenses in securing or in organizing the company.

The court held, as conclusions of law, that Davies was,

before and on March 12th, interested with Frost in the promotion and sale of the property in question in such a manner as to preclude him from securing any interest therein antagonistic to Frost; that Davies held the agreement in his own name secured from Pickrell on March 12, 1896, and all rights thereunder, for the benefit of himself and Frost, and that the Sun Dance Gold Mining Company, having full knowledge of that fact, and of the relation existing between Frost and Davies, the conveyance from Davies to the company inured to the benefit of both him and Frost, and the company was charged with knowledge thereof; that as a part of the consideration of such conveyance, and for his interest in such property, Frost became entitled to receive and have issued to him two hundred thousand shares of the stock; that the company having, with that knowledge, issued the stock to Davies, and Davies having received and held it, Frost was entitled to recover from Davies and the company the market value of the stock at the time of its issuance and at the beginning of this suit, with interest thereon.

While the evidence is not presented in the case, there does not seem to be any issue taken upon the facts, but the issues have all arisen from the different legal conclusions arrived at and the different deductions drawn from the facts as agreed upon. The examination of the complaint satisfies us that the facts therein alleged would be sufficient, if fully sustained by the evidence, to constitute a valid cause of action against the defendants, and that the demurrer to the complaint upon the grounds on which it was urged was properly overruled by the court. The remaining two assignments of error, to wit, that the findings of the court are not supported by the allegations of the complaint and the law, and that the court erred in its conclusions of law, are based upon the ground that the allegations of the complaint, and the facts as found by the court within the allegations of the complaint, are not sufficient to sustain an action for fraud against the defendants. The facts in the case, as alleged in the complaint, found by the court, and accepted by counsel on both sides in their pleadings, establish beyond question that on March 12, 1896, Frost and Davies, by mutual understanding and agreement, were jointly interested in the purchase and disposal of the Silver Trail and W. E. Thorne mines; that their relations

were such as to impose mutual obligations on each to deal with the other in the utmost good faith and candor. In this enterprise they stood in such relation, and were bound up in such a community of interests, as forbade either dealing with the subject-matter of that interest to the detriment or exclusion of the other. As to the purchase and sale of these mines they stood in the relation of partners, and each, as such, was agent and trustee for the other. This community of interests and this partnership relation existing between Davies and Frost in this transaction on March 12, 1896, rendered it legally impossible for Davies to surreptitiously secure a new option in his own name and for his sole benefit, to the exclusion or detriment of Frost; and his attempt to do so did not, in equity, work a change of the legal situation in the escrow agreement, or of the rights of the parties under it, and left wholly unaffected the one-half interest of each in the property; Davies becoming, as the legal result of his action, a trustee of Frost to the extent of the latter's one-half interest in the property. This being the case, it is not necessary that actual fraud should be either alleged or found. The object of the rule which precludes trustees from dealing for their own benefit in matters to which their trust relates is to prevent secret frauds by removing all inducements to attempt them. The rule is not confined to trustees or others who hold the legal title to the property to be sold, but applies universally to all who come within its principle, which is that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account. *Fulton v. Whitney*, 66 N. Y. 548; *Van Epps v. Van Epps*, 9 Paige 241. This rule is aptly expressed in the American note to *Keech v. Sandford*, 1 White & T. Lead. Cas. Eq. 53, as follows: "Whenever one person is placed in such a relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." Bispham says: "This rule not only applies to persons standing in fiduciary relation towards each

other,—such as trustees, executors, attorneys, and agents,—but also to those who occupy any position out of which a similar duty ought, in equity and good morals, to arise.” Bisp. Eq., sec. 93. When Davies went to Prescott, March 7, 1896, he went in the interest of himself and Frost. He was the trusted representative of Frost. Frost paid one half of his expenses, and furnished him with a letter of introduction to the owner of the property he went to examine. Frost and he had each paid one half of the first payment on that property. He was there under agreement with Frost that he would either pay the two thousand dollars to become due at an early date, or advise Frost in Chicago in ample time to make that payment. Then, without either returning the money, or repudiating the promise to Frost, or resigning the trust, or making any disclosure to Frost as to his intention, he secretly secured an agreement from Pickrell for a deed that would transfer the property to him individually to the exclusion of Frost. At the time he entered into this agreement he was the trusted agent of the plaintiff, and it was only by the violation of duties that he owed to Frost that he could secure a personal advantage to Frost’s detriment. In a similar case to the one at bar—*Müller v. O’Boyl* (C. C.) 89 Fed. 140—the court held: “In this matter he was the trusted agent of the plaintiff. If it was open to him at all to throw off his agency and acquire the contract for himself, he could only do so after the frankest disclosures to the plaintiff of all the circumstances, and distinct notice of his intentions to act in his own behalf, to the exclusion of the plaintiff.” The observations of Chief Justice Gibson in *Bartholemew v. Leech*, 7 Watts, 472, in respect to the incapacity of a confidential agent to acquire title in hostility to his principal, are very pertinent here: “To capacitate him as a purchaser on his own account, he must have explicitly resigned his trust. The most open, ingenuous, and disinterested dealing is required of a confidential agent while he consents to act as such, and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. To leave a doubt in this respect is to turn himself into a trustee. It is unnecessary to recur to authority for a principle so familiar or so accordant with common honesty.” The principle which

lies at the foundation of this and all similar cases is that: "Equity will not allow one to profit by the violation of his own duty. Where a duty rests upon one party in respect to the property of another the violation of or omission of which will result in the sale of the property, the person owing that duty is absolutely disqualified from becoming a purchaser at such sale for his own account." *Bennett v. Austin*, 81 N. Y. 322. Davies, under the law, was, by the conditions under which he acted, constituted a trustee for the benefit of himself and Frost, and the sole effect of his conduct was to make himself, instead of Frost, the holder of the option in the interest of both. Frost is authorized to treat the subject-matter of the trust as if no change had been made in the situation. In this situation the conveyance of Davies transferred to the company the interests of both him and Frost, and in equity amounted to exactly the same as if Frost had himself made the conveyance; and by such conveyance Frost became entitled to receive from the company the consideration which was fixed for his interest, namely, two hundred thousand shares of stock. Of this situation the company had full knowledge. Davies was himself president of the company. The other members of the board of directors had full knowledge of the whole situation, of the company's agreement with Frost for the transfer of the property on these terms, and of the manner in which Davies had substituted himself for Frost in the instrument of conveyance; and when the company accepted the conveyance of Frost's interest the board of directors joined with the president of the company in the transaction while cognizant of all the facts and of the rights and equities of Frost. When knowing Davies's relation to Frost, and knowing that he intended to keep all the stock and give Frost nothing, the company gave Davies two hundred thousand shares of stock belonging to Frost, and paid him Frost's expenses, it rendered itself equally liable to Frost in this action. The judgment in this case, based upon the value of the stock at the time Frost became entitled to it, as found by the court, seems eminently proper, and is abundantly sustained by the facts as shown in the record. The judgment of the lower court is therefore affirmed.

Street, C. J., and Davis, J., concur.

[Civil No. 546. Filed March 22, 1901.]

[64 Pac. 427.]

JAMES L. UTTER et al., Plaintiffs, v. BENJAMIN J. FRANKLIN et al., Loan Commissioners of the Territory of Arizona, Defendants.

1. MANDAMUS—OPERATES ON OFFICE—ABATEMENT—CHANGE OF PERSONNEL DOES NOT CAUSE—REVIVOR—NOT NECESSARY AGAINST SUCCESSOR OF OFFICER.—The writ of *mandamus* operates on the office rather than on the individual who occupies the office, and therefore does not abate by a change in the personnel of the office, and no revivor is necessary against a successor of the officer against whom the proceedings were instituted.
2. LEGISLATIVE AUTHORITY—OF CONGRESS—OF TERRITORIAL LEGISLATURE—ORGANIC LAW—PARAMOUNT LAW—WHAT CONSTITUTES—CONSTITUTIONAL LAW—ACTS CONG. JUNE 25, 1890, AUGUST 3, 1894, JUNE 6, 1896, AND REV. STATS. ARIZ. 1887, TIT. 31, AND LAWS ARIZ. MARCH 19, 1891, CITED—LAWS ARIZ. 1899, ACT NO. 32, HELD VOID.—Congress having full authority to legislate directly for the territory, and the territorial legislature having only such power as is specifically delegated to it by Congress, whenever the latter legislates upon any subject pertaining to the territory such legislation has the force and effect of a constitutional provision, and becomes a part of the Organic Law, and therefore the act of Congress of June 25, 1890, *supra*, amending, approving, and confirming, "subject to future territorial legislation," Revised Statutes of Arizona, title 31, *supra*, creating a board of loan commissioners for the funding of the existing territorial indebtedness, having been accepted by the territorial legislature by act of March 19, 1891, *supra*, is now the paramount law upon the subject of funding, and becomes a part of the Organic Law, to the extent that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress, and act No. 32, *supra*, repealing the territorial acts creating such commission is void.
3. STATUTORY CONSTRUCTION—STATUTES NOT IN EXPRESS TERMS REPUGNANT—REPEAL BY IMPLICATION.—When two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former, and embraces new provisions, plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act.
4. COUNTY BONDS—REFUNDING—GOOD FAITH—RAILROAD CONSTRUCTION—MANDAMUS—LAWS ARIZ., ACT FEB. 21, 1883, ACTS CONG., JUNE 25, 1890, AND JUNE 26, 1896, CITED AND CONSTRUED.—The Territorial Act of February 21, 1883, *supra*, authorized Pima

County to issue bonds in the amount of two hundred thousand dollars, to be exchanged for bonds of a railroad, thereafter to be constructed, in the following manner: Fifty thousand dollars when the company was organized, and a like amount "so often as each five miles of said railroad shall have been graded, laid with ties and iron," the proof the work having been performed to be the certificate of the county surveyor. The company was organized and ten miles of the road graded and laid with ties and iron, and one hundred and fifty thousand dollars in bonds were issued to the company according to the terms of the act. Work on the road was thereafter abandoned, the road was never completed, nor was any payment either of interest or principal made by the county upon the bonds. The act of Congress of June 6, 1896, *supra*, having provided that all outstanding bonds of the territory and counties thereof which had been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized should be funded in accordance with the act of Congress of June 25, 1890, creating a board of loan commissioners, whose duty it was to provide for the redeeming and refunding of the territorial or county indebtedness by the issuance of bonds therefor, and *mandamus* being brought to compel the loan commissioners to fund the bonds of Pima County issued to the railroad company: *Held*, that the exchange of bonds was not rendered fraudulent by the fact that the railroad had not been completed, the issuance and payment not being dependent upon completion, and that the bonds should therefore be funded.

AFFIRMED. 186 U. S. 95; 46 L. Ed. 1070, *sub nom. Murphy v. Utter*.

ORIGINAL APPLICATION for Writ of Mandamus

Barnes & Martin, for Plaintiffs.

Congress has complete control over the territories. Const., art. IV, sec. III, subd. 2.

The organic act under which a territory is organized takes as to the territory the place taken by a constitution, and an act of the territorial legislative assembly derives its legal force and validity from such organic act. 25 Am. & Eng. Ency. of Law, 956.

On the ground that the legislature had legislated beyond the limitations placed upon the legislative power by Congress the above act was held to be void. For want of legislative power delegated by Congress, the act was held to be *ultra vires*. To cure this defect Congress passed the act of June 6, 1896. This law is retrospective, and intended so to be. It declares that all bonds, warrants, and other evidences of in-

debtedness heretofore funded are hereby declared to be valid and legal and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory are hereby confirmed, approved, and validated.

If Congress had power to enact such a law, then the act validates said bonds.

As said above, Congress has full power to legislate for the territories. It may do so directly, or may create a legislative assembly with power to legislate. Having done the latter, its supreme power is not lost.

As was said by the supreme court of the United States, in *First National Bank v. Yankton*, 101 U. S. 129, "There was no express reservation of power in Congress to amend the acts of the territorial legislature, but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all departments of the territorial government."

In the case of *Insurance Co. v. Bales of Cotton*, 1 Pet. 543, Justice Marshall, in 1828, speaking for the court, decided that the power of Congress to legislate for the territories "is unquestioned," and the case of *Dred Scott v. Sanford*, 19 How. 633, sustains this doctrine. *Doucheneau v. House*, 10 Pac. 839.

New Orleans v. Clark, 95 U. S. 644. Bonds issued were invalid because the city had exceeded the power by law to issue them. The question presented was, "Whether it was competent for the legislature of Louisiana to legalize the issue of the bonds, if for any cause they were originally invalid." The court answers in the affirmative, saying: "The books are full of cases where claims, just in themselves, but which from some irregularity or omission in the proceeding by which they were created could not be enforced in the courts of law, have been thus recognized and their payment secured."

The legislature may direct a municipal corporation to apply funds arising from taxation in payment of a claim that could not be enforced at law.

"The legislative authority is only limited by constitutional provisions." *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192.

The constitution has made no such limitation upon the power of Congress to legislate for the territories.

In *Rogers v. Keokuk*, 154 U. S. 546, 14 Sup. Ct. 1162, the court treats the question in a very summary manner. The opinion is short, cites no authority, and treats the matter as a settled question, and says in a few words that the legislature having power to authorize a municipal corporation to subscribe for stock in a railway company, that the act in question gave validity to the bonds issued, notwithstanding any informality or illegality in their issuing. Other cases are *Randall v. Krieger*, 23 Wall. 137; *St. Joseph v. Rogers*, 16 Wall. 666; *Thomson v. Lee County*, 3 Wall. 327; *Beloit v. Morgan*, 7 Wall. 619; *City v. Lamson*, 9 Wall. 485; *Campbell v. Kenosha*, 5 Wall. 195; *Marsh v. Fulton County*, 10 Wall. 676; *Otoe County v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265; *Thompson v. Perrine*, 103 U. S. 806; *Dows v. Elmwood*, 34 Fed. 114; *Grenada v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Jasper County v. Ballou*, 102 U. S. 745; *McMillen v. Dubuque*, 1 Wall. 220; *State v. Hoffman*, 35 Ohio St. 437; *Dentzel v. Waldie*, 30 Cal. 145; *People v. Supervisors*, 20 Mich. 104; *May v. Holbridge*, 23 Wis. 97; *Brewster v. Syracuse*, 19 N. Y. 116; *Kunkel v. Franklin*, 13 Minn. 127, 97 Am. Dec. 226; *Stuart v. Warren*, 37 Conn. 225; *McMillan v. Boyce*, 6 Iowa, 330; *Board v. Bright*, 18 Ind. 83; *Gibbon v. Railroad Co.*, 46 Ala. 410; *Thomas v. Leland*, 24 Wend. 65; *Weister v. Hade*, 52 Pa. St. 474; *Johnson v. Campbell*, 49 Ill. 316.

This proceeding was begun against the board of loan commissioners of the territory of Arizona. The fact that some of the persons who were loan commissioners at the time the suit was begun have ceased to be such does not affect the proceeding.

Speaking with reference to the writ of *mandamus* the supreme court of the United States (103 U. S. 480) says (p. 483): "The proceedings may be commenced with one set of officers and terminated by another, the latter being bound by the judgment." See, also, Dillon on Municipal Corporations, 4th Ed., sec. 861b; *Leavenworth County Commrs. v. Sellow*, 99 U. S. 624; *People v. Collins*, 19 Wend. 56; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 17 Sup. Ct. 225.

C. W. Wright, and Rochester Ford, for Appellee.

SLOAN, J.—The plaintiffs, December 31, 1896, filed their petition in this court, which prayed for a writ of mandate to compel the defendants, who were then, respectively, governor, auditor, and secretary of the territory, and who, by virtue of holding said offices at the date of the filing of said petition, were the loan commissioners of the territory, to fund the bonds, and the interest due thereon, issued by Pima County in aid of the Arizona Narrow-Gauge Railroad Company under the provisions of a territorial act of February 21, 1883. The defendants demurred to the petition, and, by way of answer, set up that the bonds sought to be funded, in the suit of Lewis against Pima County, by the district court of said Pima County, were declared to be void and of no binding obligation upon the said county; that the judgment of the district court was, upon appeal, affirmed by the supreme court of the territory, and on appeal from the judgment of this court the latter was affirmed by the supreme court of the United States; that the judgment so rendered and affirmed in the Lewis case was *res adjudicata* and binding upon the plaintiffs in this suit. The records of this court in the present case show that the demurrer to the petition was sustained, and the petition dismissed, whereupon an appeal was taken to the supreme court of the United States. The latter court reversed the judgment of this court, and remanded the cause “for further proceedings not inconsistent with the opinion.” *Utter v. Franklin*, 172 U. S. 424, 19 Sup. Ct. 183, 43 L. Ed. 498. In the opinion the supreme court held that the judgment in the case of Lewis, holding that the bonds were invalid because the territorial legislature had no authority to authorize their issuance under the organic law, “was *res adjudicata* only of the issues then presented, of the facts as they then appeared, and under the legislation then existing”; that the act of Congress of June 6, 1896, cured this defect, and validated the territorial act of February 21, 1883, and made it the duty of the loan commissioners to fund the bonds in question. Upon the filing of the mandate of the supreme court in this court, the defendants asked leave to file an amended return raising new issues of fact, and setting up that the bonds in question were “not sold or exchanged in good faith and in

compliance with the act of the legislature by which they were authorized," and so were not of the class of bonds validated by the act of June 6, 1896, and required to be funded thereby. Leave to file this amended return was granted for the reason that the record in this court, where the cause originated, discloses that the judgment of this court from which the appeal was taken to the supreme court of the United States was rendered upon the issue of law raised by the demurrer, and not upon any issue of fact raised by the original return. We took the view that in the state of the record the mandate of the supreme court reversing the cause, and remanding it to this court "for proceedings not inconsistent with the opinion," made it our duty to consider and decide any issue of fact, properly pleaded, which amounts to a defense, and which is not in fact decided by the supreme court in passing upon the issue of law presented by the demurrer; that, under the law and practice regulating appeals of this character, such a mandate, being general in its terms, is to be construed as justifying this court in considering and deciding any question left open by the mandate and opinion of the appellate court. *Ex parte Union Steamboat Co.*, 178 U. S. 318, 20 Sup. Ct. 904, 44 L. Ed. 1084. The issue of fact raised by the amended return, and which, in our view, was left open by the opinion and mandate of the supreme court, involves the question as to whether the bonds were exchanged by the county of Pima for the bonds of the Arizona Narrow-Gauge Railroad Company in good faith, and in compliance with the act of the territorial legislature of February 21, 1883. Upon the order permitting the defendants to file their amended return being made, a commissioner was appointed to take and report the testimony which the parties might desire to put in bearing upon the new issue of fact raised by the amended return. The evidence has all been taken, and is now before us. The defendants now present two objections to the granting of the writ of mandate which arise out of facts that did not exist at the time the case was heard in this court on the demurrer. These are: 1. That the action was begun against Benjamin J. Franklin, governor, C. P. Leitch, auditor, and C. M. Bruce, secretary, and that each of the defendants has long since been superseded in office by another person, and that therefore the action should abate; and 2.

That the loan commission has ceased to exist, by repeal of the statute creating the same, and no provision was had in the repealing statute reserving from its operation pending proceedings, and that therefore the action must abate, because there is no officer or person upon whom the duty rests to fund the bonds in question, or against whom the writ of mandate may be enforced.

Upon the first point raised we deem it sufficient to say that the weight of authority in the state courts is in favor of the view that the writ of *mandamus* operates on the office, rather than on the individual who occupies the office, and therefore does not abate by a change of personnel in the office, and that no revivor is necessary against a successor of the officer against whom the proceedings were instituted. This also appears to be the rule as followed in the supreme court of the United States whenever a proceeding is to enforce a continuing duty against a corporation or municipality. *Thompson v. United States*, 103 U. S. 482, 26 L. Ed. 521; *Commissioners v. Sellew*, 99 U. S. 624, 25 L. Ed. 333. The loan commissioners were, by the statute creating the board, made a continuing body, and the delinquency complained of related to a continuing duty of the commission; and we see no reason why the doctrine as applied in the above cases does not apply to the present proceeding. *Ex parte Parker*, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123.

The question as to whether the loan commission has been abolished is one which involves a consideration of not only the repealing statute, but, as well, the various acts, congressional and territorial, relating to the creation of the commission, its duties, and the general subject of funding. In the Revised Statutes of 1887 there was incorporated, as title 31, an act which provided for the creation of a commission to be known as the "Loan Commissioners," and the funding by this commission of the outstanding and existing indebtedness of the territory. This commission was to be composed of the governor, auditor, and secretary of the territory. Congress, by the act of June 25, 1890, amended the territorial act in important particulars, and then "approved and confirmed" the same, "subject to future territorial legislation." The territorial legislature, construing the clause "subject to future territorial legislation" to mean that Congress, having

taken up the territorial act of 1887 and amended it before making it binding and operative upon the territory, chose to confer upon the latter the privilege of consenting to or disapproving of its provisions, by its act of March 19, 1891, supplemented the congressional act by additional provisions intended to more perfectly carry out its provisions, and in the first section declared that the latter act should "be and the same is hereby now re-enacted as of the date of its approval." The language used in the territorial act indicates that the territorial legislature intended to approve of the congressional act and accept its provisions, under the permission granted and expressed in the clause "subject to future territorial legislation." Whether this construction was primarily right or not, it has been subsequently followed by the legislative assembly of the territory and acquiesced in by Congress. Congress, by the act of August 3, 1894, amended section 15 of the act of June 25, 1890, by extending its provisions so as to permit the funding of additional indebtedness. When the next legislature convened after the passage of the congressional act just mentioned, construing, as did its predecessor, the clause "subject to future territorial legislation" to mean that the congressional act should only become operative when accepted by the territory through its general assembly, by act approved March 19, 1895, ratified and confirmed the objects, purposes, and provisions of the congressional act. In the congressional act of August 3, 1894, and in the curative act of Congress of June 6, 1896, the act of Congress of June 25, 1890, is referred to; and no mention is made of a re-enactment of the same by the territorial legislature, which is significant, as indicating that Congress recognized the act of June 25, 1890, as having become operative, and as continuing in force, and as constituting the existing law upon the subject of funding. Congress having full authority to legislate directly for the territory, and the territorial legislature having only such power as is specifically delegated to it by Congress, whenever the latter legislates upon any subject pertaining to the territory such legislation has the force and effect of a constitutional provision, and becomes a part of the organic law. Had the clause "subject to future territorial legislation" not appeared in the act of June 25, 1890, unquestionably the act would have become immediately operative, without the consent or ac-

quiescence of the territory; and no subsequent legislation by the territorial legislature would have been needed to give it effect, or could in any way affect its provisions. In the light of the contemporaneous construction placed upon the clause "subject to future territorial legislation" by the legislature of the territory, and in view of the fact that Congress thereafter invariably referred in subsequent legislation to the act of Congress of June 25, 1890, and made no mention of any re-enactment of the same by the territory, and considering the relation which the territory sustains to Congress, we are led to the conclusion that the act of June 25, 1890, is now to be construed as having been accepted in accordance with the permission granted to accept or refuse the same, and, having been accepted, is now the paramount law upon the subject of funding, and becomes a part of the organic law, to the extent, at any rate, that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress.

The repealing statute which we have referred to (being act No. 32 of the Laws of 1899) reads as follows: "That paragraph 2039, section 1, chapter 1, title XXXI, of the Revised Statutes of the territory of Arizona; also that section 1 of act No. 79, Session Laws of the sixteenth legislative assembly of the territory of Arizona; also act No. 33 and act No. 74, Session Laws of the eighteenth legislative assembly of the territory of Arizona, are hereby repealed." Paragraph 2039, referred to in this act, was reincorporated as the first section of the congressional act of June 25, 1890, and reads as follows: "For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the territory of Arizona, the governor of the said territory, together with the territorial auditor and the territorial secretary and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the territory of Arizona, and shall have and exercise the power and perform the duties hereinafter provided." Act No. 79, referred to, is the act of March 19, 1891. Act No. 33 and act No. 74, sought to be repealed by the act, do not pertain to the creation of the board of loan commissioners, and their consideration is not important in this connection. The act of Congress of June 25, 1890, covered the

whole field of the previous territorial legislation upon the subject of funding, and included such new legislation as to clearly indicate the intent that it should take the place of the territorial act of 1887. When two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former, and embraces new provisions, plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act. *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153. The act of Congress, being revisory in its terms, embracing new provisions, and covering the whole subject of funding, supplemented and thereby repealed the territorial statute of 1887. As repeals by implication are not favored, the repeal of the first section of the statute of 1887 can, therefore, have no effect to repeal the similar provision of the act of June 25, 1890. Again, by the attempted repeal of the first section of the act of March 19, 1891, which, as we have seen, provided, in terms, "that the act of Congress entitled 'An act approving, with amendments, the funding act of Arizona approved June 25, 1890,' be and the same is hereby now re-enacted as of the date of its approval," the intent of the legislature is uncertain, in that it is not made evident whether the repeal of said section is to be construed as an attempt to repeal the whole, or only a part, of the congressional act, if it can possibly be construed as tending to either result. It can hardly be construed as an attempt to repeal the whole of the act of June 25, 1890, inasmuch as the other sections of the act of March 19, 1891, were excepted from the repealing act, and these were supplemental to the congressional act. If the repealing of section 1 of the law of 1891 be construed as a repeal of only a part of the act of June 25, 1890, how, then, can the court give it effect by declaring what portion of said act it was designed and intended to affect? Irrespective, therefore, of the question of the power of the territorial legislature to repeal the congressional act creating the loan commission, it is more than doubtful if the act of 1899 can be construed so as to effect that result.

Mr. Justice Brown, in the opinion delivered in this case in the supreme court, construing the act of Congress of June 6, 1896, said: "The first section of the act requires the funding of all outstanding obligations of said territory and its municipalities, and all outstanding bonds, etc., of the territory

and its municipalities, 'heretofore authorized by legislative enactment of said territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 25, 1890,' which said bonds, etc., 'have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized'; and the second section confirms, approves, and validates all bonds and other evidences of indebtedness theretofore issued under the authority of the legislature, and authorized to be funded by the first section, and declares that they may be funded as in this act provided, until January 1, 1897." As we have said, therefore, under the opinion of the supreme court, and its mandate, as well as under the terms of the act of June 6, 1896, we are limited, under the issues of fact raised by the amended return, to the inquiry as to whether the bonds in question "have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized." The first two sections of the act of February 21, 1883, read as follows:—

"Section 1. Upon information in writing to the chairman of the board of supervisors of Pima County, Arizona Territory, by the president of the Arizona Narrow-Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of said territory on the 23d day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said county of Pima, according to the provisions of this act, it shall be the duty of said chairman, and he is hereby directed to call a meeting of said board, to be held within five days after the receipt of said notification, and it shall be the duty of said board of supervisors, and they are hereby directed to meet within five days, at the county seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said county, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent per annum, interest payable semiannually, the principal payable in twenty years, which said bonds, and the interest coupons thereto attached, shall be signed by said chairman and the clerk of said board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the clerk of said board to the county treasurer of said county of Pima, to be by him

disposed of as hereinafter provided, and said county treasurer shall receipt to the said clerk for the said bonds.

"Sec. 2. Upon the application of said railroad company to the said treasurer, and the tender by said company of fifty thousand dollars of the first mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said county, it shall be the duty of said treasurer and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the president and secretary of said railroad company, in exchange for fifty thousand dollars of the first mortgage bonds of said railroad company, so tendered as above provided. And whenever and so often as each five miles of said railroad shall have been graded, laid with ties and iron, said treasurer shall upon proof thereof, which proof shall be the certificate of the county surveyor to that effect, exchange with the said president and secretary of said railroad company fifty thousand dollars of said bonds of said Pima County for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima County are exchanged for a like number of bonds of said railroad company."

It is to be noted that under the provisions of these sections of the statute the bonds of the county were to be exchanged for the bonds of the railroad company under the condition therein provided, and it does not provide for a sale of the same. It is also to be noted that of the issue of two hundred thousand dollars of the bonds of the county, called for by the act, fifty thousand dollars was to be exchanged upon the organization of the company, and upon notice to the county of the company's readiness to exchange a like amount of bonds the county was to deliver to the company bonds to the amount of fifty thousand dollars; that a like amount was to be delivered by the county treasurer to the company in exchange for a like amount of railroad bonds whenever the county surveyor should certify that five miles of the company's railroad had been graded and laid with ties and iron, and thereafter, upon the completion of an additional five miles of said railroad as provided, the county treasurer, upon proof thereof by the certificate of the county surveyor to that effect, should exchange a like amount of county bonds

for the same amount of railroad bonds, until the full issue (\$200,000) of the county bonds had been exchanged for a like amount of railroad bonds. Under the act, therefore, the question is narrowed to the inquiry as to whether each provision of the statute relating to the exchange of bonds was complied with by the railroad company, on the one part, and the officers of the county, on the other. The records of the board of supervisors of Pima County show that on the twenty-sixth day of April, 1883, W. H. Culver, president of the Arizona Narrow-Gauge Railroad Company, addressed a letter to James H. Toole, chairman of the board of supervisors of Pima County, notifying the latter that the Arizona Narrow-Gauge Railroad Company was ready to exchange its bonds for the bonds of the county in accordance with the provisions of the act of February 21, 1883. On May 5, 1883, as it appears in the minutes of the board, an order was made that two hundred thousand dollars of bonds of the county be issued, and be placed in the hands of the county treasurer, upon the condition expressed that the Arizona Narrow-Gauge Railroad Company execute a bond to the county in the sum of five hundred dollars, conditioned that if the county bonds were not exchanged in accordance with the provisions of the act of February 21, 1883, the said railroad company would repay to said county all expense incurred in the issuance of said bonds. A receipt was introduced in evidence, dated August 3, 1883, and signed by one J. C. Elliott, then county treasurer, acknowledging the receipt from the clerk of the board of supervisors of the county of two hundred bonds, of the denomination of one thousand dollars each, to be issued to the Arizona Narrow-Gauge Railroad Company as provided by law. It appears in evidence that the first exchange as provided by the act, of fifty thousand dollars county bonds for a like amount of railroad bonds, was made at some date during the year 1883. This is shown by the record in an action brought by a taxpayer of the county against the board of supervisors and the county treasurer in the district court of Pima County during the latter part of the year 1883 to restrain the latter from accepting the bonds of the Arizona Narrow-Gauge Railroad Company in exchange for the bonds of the county. It is also shown that these (bonds to the amount of) fifty thousand dollars were delivered during

the year 1883 to the railroad company by the county, by the minute entry of the board of supervisors, showing the action of the board taken with reference to an application filed June 16, 1884, by the railroad company, and an offer by the railroad company to return to the county fifty thousand dollars of county bonds and accept in full payment therefor county warrants of the face value of \$22,500. It appears from the evidence that prior to the year 1886 the railroad company had expended in the construction of the road not to exceed twelve thousand dollars; that during that year the railroad company entered into a contract with one W. W. Walker wherein the latter undertook to complete the road in accordance with the act of the legislature and original intent of the company; that under this contract the county bonds held by the railroad company were turned over to Walker. It further appears that Walker represented the firm of Coler & Co., bankers and brokers of New York City; that under the Walker contract said Coler & Co. transmitted to the Bank of Tucson, for the building of the road, \$52,900.40; that there was graded, and laid with ties and rails, ten miles of road by Walker under his contract; and that thirty miles in all was graded. It also appears that when the first five miles of road had been built the county treasurer turned over to Walker, for Coler & Co., under their contract with the railroad company, fifty thousand dollars of county bonds in exchange for a like amount of railroad bonds, and that subsequently, upon the completion of the ten miles of road, a like exchange was made of an additional fifty thousand dollars. George J. Roskrue testified that in 1886 he was county surveyor of Pima County, and examined the railroad constructed by the Arizona Narrow-Gauge Railroad Company; that he measured the road on two occasions, and found upon the first that there was five miles graded, laid with ties and rails, and upon the second found that there was ten miles of road graded and laid with ties and rails, and gave his certificate to the county treasurer upon both occasions, in the language of the act of February 21, 1883, stating the facts as he found them. It further appears that there was graded under the Walker contract in the neighborhood of thirty miles of road, but only the first ten miles of the road was ever laid with ties and

rails; that for various reasons Walker or Coler & Co. either were unable to, or chose not to, complete the road. The records of the board of supervisors show that in 1887 an agreement was entered into between the railroad company and Walker, on the one part, and the board of supervisors and the county treasurer, on the other part, whereby it was agreed that the county should sell to the railroad company and Walker one hundred and fifty thousand dollars of railroad bonds held by the county, to said railroad company for twenty-five cents on the dollar, and to receive in payment the bonds of the county at par; and the railroad company and Walker agreed to build and put into operation sixty miles of said road, and secure the majority of the trade of the town of Globe for the city of Tucson. There were other provisions in the contract relating to the exchange of the remaining fifty thousand dollars of county bonds held by the treasurer in exchange for a like amount of bonds of the railroad, and the sale of the latter to the railroad company upon the same terms as were provided in the contract for the bonds already exchanged. It further appears that this agreement was not complied with on the part of the railroad company or Walker, and that on July 23, 1890, the board of supervisors made an order, and transmitted the same to the county treasurer, directing the latter to cancel the remaining fifty thousand dollars of county bonds held by him. It further appears from the evidence in the case that nothing has ever been paid by the county in the way of interest upon bonds of the county delivered to the railroad company.

Do these facts show that the bonds in question are included among those required by the act of Congress of June 6, 1896, to be funded? It must be conceded that the county of Pima derived little or no benefit from the building of the few miles of the Arizona Narrow-Gauge Railroad. However, there can be no question, under the proof, that the terms of the act of February 21, 1883, were fully complied with, both on the part of the county and, as well, on the part of the railroad company, in the matter of the issuance and exchange of the bonds, to the extent that the legislative act specifically provided. There was nothing in evidence showing bad faith on the part of the railroad company, in so far as the first exchange of bonds was concerned; nor is there any evidence

which shows bad faith on the part of the company, or its contractor, Walker, and his principals, Coler & Co., except their failure to continue the building and equipment of the road after the completion of the thirty miles of grading and laying of ten miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Co. had difficulty in raising the money for the payment of the work done, and did not have the resources to go on and complete the work. Can the court say that notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid, and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue the original holders of those bonds failed to complete the railroad, and the county of Pima thereby received no benefit from the same? The question of a failure of consideration is to be distinguished from that of an exchange of bonds in good faith under the act of June 6, 1896, unless the failure of consideration was due to a failure on the part of the holders of the bonds to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the one which required a certificate of the county surveyor showing that each five miles of the road was graded and laid with ties and iron, as a condition precedent to the exchange of each fifty thousand dollars of county bonds for a like amount of railroad bonds. As the supreme court has held in this case, Congress by the act of June 6, 1896, has validated the territorial act of February 21, 1883. And as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction, so long as there was not only a substantial compliance, but a literal as well, with the requirements of the act under which they were issued. We are forced to the conclusion, therefore, that no facts have been shown under the amended return which would warrant us in holding that the bonds in question were excluded from the provisions of the act of June 6, 1896, but, on the contrary,

find that it is our plain duty, under the decision of the supreme court construing said congressional act, and mandatory upon us, to issue the writ of mandate prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon, under the provisions of the act of June 25, 1890.

Street, C. J., Doan, J., and Davis, J., concur.

[Civil No. 755. Filed March 22, 1901.]

[64 Pac. 415.]

RACHEL MILLER, Administratrix of the Estate of Jacob L. Miller, Deceased, et al., Defendants and Appellants,
v. MARY F. MILLER, Plaintiff and Appellee.

1. EVIDENCE—ADMINISTRATORS—ACTIONS BY OR AGAINST—DEEDS—MIS-DESCRIPTION — REFORMATION — EVIDENCE — ADMISSIBILITY — HUSBAND AND WIFE—WITNESSES—REV. STATS. ARIZ. 1887, PAR. 1865, AND TIT. 25, CHAP. 4, CONSTRUED.—Paragraph 1865, *supra*, provides: "In any action by or against administrators, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statements made by the intestate, unless called to testify thereto by the opposite party or required to testify thereto by the court, . . ." Chapter 4, *supra*, provides, among other things, that "the husband or wife of a party to a proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein." The former statute does not in its terms prohibit the husband or wife of the party to an action from testifying as to any conversation which he or she may have had with the deceased during his lifetime. Therefore in an action by a grantee against a grantor's administratrix to have a deed corrected it is not error to allow the husband of plaintiff to testify to the conversations had between himself and the grantor while alive as to a mistake in the description and as to the land intended to be conveyed.
2. SAME—SAME—SAME—SAME—SAME—SAME—CROSS - EXAMINATION.—Where defendant's decedent conveyed a certain piece of property to plaintiff and later gave plaintiff a second deed, describing the same property, and plaintiff brought an action to reform the second deed so as to cover other land, it was not error for the court to

sustain an objection to a question put to plaintiff's witness on cross-examination, asking if witness had not told a third party that he thought the title good to the land first conveyed, inasmuch as the witness was not a party to the action, and there was no evidence which this would tend to contradict.

3. ~~SAME—SAME—SAME—SAME—SAME—SAME—CONVERSATION~~—IN ABSENCE OF GRANTEE—NOT ADMISSIBLE.—Evidence of a conversation between a witness and the deceased grantor, after a second deed was executed, and in the absence of the grantee, as to the purpose for which he had given the second deed, is not admissible.
4. APPEAL AND ERROR—FINDINGS OF FACT—REVIEW—CONFLICTING EVIDENCE—McCORMACK v. ARIZONA CENTRAL BANK, 5 ARIZ. 278, 52 PAC. 469; HENRY v. MAYER, 6 ARIZ. 103, 53 PAC. 590, FOLLOWED.—Where a cause is tried to the court, and the court makes its findings of fact, such findings of fact will not be disturbed unless there is a substantial failure of the evidence to support the findings.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Robert E. Morrison, for Appellants.

Herndon & Norris, and J. H. Jacks, for Appellee.

STREET, C. J.—This action was brought by Mary F. Miller against Rachel Miller, as administratrix of the estate of Jacob L. Miller, deceased, and the various heirs of said Jacob L. Miller, to correct a deed. Mary F. Miller was the owner of a certain thirty acres of land, and had been such owner by deed from Jacob L. Miller since the seventeenth day of September, 1883. Such land was described as commencing at the northeast corner of fractional northeast quarter of section 32, etc. She alleged that she purchased another thirty acres from said Jacob L. Miller on the thirteenth day of October, 1898, and the deed executed by Jacob L. Miller to her therefor contained the identical description of land as the deed of September 17, 1883, whereas it should have contained the description, as she alleges, "commencing at a point 30 rods east of the northeast corner of fractional northeast quarter of section 32," etc. The defendants deny that there was any misdescription in the deed of October 13, 1898, and

allege that the deed executed on that date by Jacob L. Miller was for the purpose of confirming title to the land conveyed by deed of September 17, 1883. Upon this issue the cause was tried to the court, and the court made findings and rendered judgment for the plaintiff, and decreed that the deed of October 13, 1898, be corrected so as to describe the property intended by the parties to be conveyed, to wit, that certain thirty acres of land particularly described, and bounded as commencing at a point thirty rods east of the northeast corner of fractional northeast quarter of section 32, etc.

The appellants assign as error: First, that the court erred in permitting Samuel C. Miller, who was the husband of the plaintiff, to testify to conversations with Jacob L. Miller, deceased, during his lifetime. Paragraph 1865 of the Revised Statutes of Arizona provides that: "In any action by or against administrators, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statements made by the intestate, unless called to testify thereto by the opposite party or required to testify thereto by the court; and the provisions of this section extend to and include all actions by or against heirs or legal representatives of the decedent arising out of any transaction with such decedent." Such statute does not, in its terms, prohibit the husband or wife of the party to the action from testifying as to any conversation which he or she may have had with the deceased during his lifetime. Our attention has not been called to any principle which would prevent the husband or wife from so testifying, neither have we been referred to any text-writer or decision of any court upon the subject. The statutes of Arizona permit parties to be witnesses under all conditions and circumstances, with but few exceptions. Chapter 4 of title 25 provides that no person shall be incompetent because he is a party to a suit or proceeding or interested in the issue tried, and that the husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein. The same chapter contains the provision above quoted in reference to actions by or against administrators, etc. The district court committed no error in allowing the husband of Mary F. Miller to

testify to the conversations had between himself and Jacob L. Miller, while alive, as to a mistake in the description of a deed, and as to the land intended thereby to be conveyed.

Assignments 2, 3, and 4 relate to the admission and rejection of evidence. Assignment 2 is on the cross-examination of Samuel C. Miller, in which witness was not permitted to answer a question as to a conversation which he had with Fitzsimmons about the title to the thirty acres conveyed by deed of September 17, 1883, when Miller was asked if he had not said that he thought the title to that was good. We are not able to see how that could have affected the question in any way. The witness was not a party to the suit, and our attention has not been called to any evidence which such an answer would tend to contradict. The third assignment was as to sustaining plaintiff's objection to a question asked by defendants of witness John Morris, called on behalf of defendants. That conversation also related to the title to the first thirty acres, and was a conversation between the witness and Jacob L. Miller after the deed of October 13, 1898, was executed, and in the absence of Mary F. Miller, the grantee, as to the purpose of the deed; upon which ruling of the court we see no error. Assignment No. 4 is but a reoffer of the evidence sought to be obtained from Fitzsimmons and Morris.

The remainder of the assignments relate to the weight of evidence. Many witnesses were sworn and examined, both for the plaintiff and the defendants, and there is some conflict in their testimony. This court, in the case of *McCormack v. Arizona Central Bank*, 5 Ariz. 278, 52 Pac. 469, said: "The evidence upon this point being conflicting, and the trial court having found for the plaintiff, we cannot, of course, disturb this finding." Again, in *Henry v. Mayer*, 6 Ariz. 103, 53 Pac. 594, we said: "The finding of the trial court should be given great weight, and be deemed conclusive in controverted questions of fact in equity and in actions at law, unless there be forcible reasons to warrant the inference that they are erroneous. Particularly should this rule be regarded when the right determination of the facts may have depended on the judgment of the trial court as to the credibility of the various witnesses, and not merely upon reason and deductions as applied to a mass of facts and circumstances about which there may be little or

no dispute." It is the settled rule of this court and of the various appellate courts that, where a cause is tried to the court, and the court makes its findings of fact, such findings of fact will not be disturbed unless there is a substantial failure of the evidence to support the findings. In this case not only is there an abundance of evidence to support the findings, but in a careful review of the evidence we approve of the findings made by the district court. The judgment of the district court is affirmed.

Doan, J., and Davis, J., concur.

[Civil No. 756. Filed March 22, 1901.]

[64 Pac. 417.]

TERRITORY OF ARIZONA, ex rel. Attorney-General,
Appellant, v. TOWN OF JEROME, Appellee.

1. CONSTITUTIONAL LAW—MUNICIPALITIES—INCORPORATION OF—NOT A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW—NOTICE—UNNECESSARY—ACT OF APRIL 12, 1893, ACT NO. 72, HELD NOT IN CONFLICT WITH ACT CONG. JULY 30, 1886, HARRISON ACT.—The incorporation of a municipal body has never been regarded as imposing taxes upon people, in the sense of taking property for a public use or taking property without due process of law, if all parties were not notified by publication or otherwise. The statute, *supra*, providing for the incorporation of towns, violates no provision of the constitution of the United States or the act of Congress, *supra*, in not providing for notice to the parties interested.
2. SAME—SAME—SAME—PORTION OF A COMMUNITY MAY INCORPORATE—DUTY OF BOARD OF SUPERVISORS—ACT NO. 72, LAWS 1893, CONSTRUED.—The act, *supra*, providing that whenever two thirds of the taxable inhabitants of any town shall petition the supervisors of the county for the incorporation of the town, setting forth the metes and bounds of the same, the board may order such town incorporated, only required that the board of supervisors shall ascertain whether the petitioners live within the territory described in the petition by metes and bounds, and whether they constitute two thirds of the taxable inhabitants within such metes and bounds; and if two thirds of the taxable inhabitants living within the area described in the petition join in such petition, it is immaterial whether or not such area comprises the whole town.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, Attorney-General, and E. M. Sanford (of Counsel), for Appellant.

It appears that the board caused a notice of the application for incorporation to be published in the Jerome newspapers. This is insufficient. The act must provide for notice. "It is not enough that the owners may, by chance, have notice, or that they may, as a matter of fact, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard." *Garvin v. Dausman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 828; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Hood etc. Co. v. Wasco County*, 35 Or. 498, 57 Pac. 1026; *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958; *Campbell v. Dwiggins*, 83 Ind. 473; *Whitford v. Probate Judge*, 53 Mich. 130, 18 N. W. 593; *Thomas v. Gains*, 35 Mich. 155; *Brown v. Denver*, 7 Colo. 305; 3 Pac. 455; *Philadelphia v. Müller*, 49 Pa. St. 446; *Santa Clara v. Railroad Co.*, 13 A. & E. Cas. 182; *Overing v. Foote*, 65 N. Y. 263; *Gatch v. Des Moines*, 63 Iowa, 718, 18 N. W. 312.

After the incorporation the inhabitants or taxpayer is concluded from questioning the validity of incorporation. *State v. Mayor*, 41 Atl. 98; *Kansas City v. Stegmüller*, 151 Mo. 189, 52 S. W. 723. After the incorporation comes taxation, and on those questions he has an additional right to be heard. *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Paulson v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750. The facts in the case at bar are the strongest argument against *ex parte* proceedings creating incorporations. Only a part of the town was incorporated, and two thirds of the taxable inhabitants of the town did not sign the petition. *Callen v. Junction City*, 43 Kan. 627, 23 Pac. 652.

This proceeding is a direct attack by the sovereignty, and the appellant is bound to show nothing, as the burden is on the appellee, and it must by answer either disclaim or justify, or the territory will be entitled to a judgment of ouster. *Clark v. People*, 15 Ill. 213; *Carrico v. People*, 123 Ill. 198, 14 N. E. 66; *Distillery etc. Co. v. People*, 15 Ill. 448.

In case of justification the appellee must set out his title specifically. *Railway Co. v. People*, 84 Ill. 426; *Holden v. People*, 90 Ill. 434.

Reese M. Ling, and H. M. Gibbes, for Appellee.

"There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which requires notice to or hearing of the parties included therein, before it can be formed." *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56.

Unless restrained by constitutional limitations upon special legislation, the legislature has the power to create a municipal corporation without notice to or hearing of the persons residing or owning property within the municipality. *People v. Carpenter*, 24 N. Y. 86; *Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Territory v. Stewart*, 1 Wash. 98, 23 Pac. 405.

"Placing property within the corporate limits of a given city or town, where it will be subjected to the additional burden of municipal taxation and supervision, is not a taking of the property at all. The ownership is in no degree changed, and the increased burden is presumed to be equalled by the increased advantages." *Williams v. City of Nashville*, 89 Tenn. 487, 15 S. W. 364; *Wade v. Richmond*, 18 Gratt. 583; *Stütz v. Indianapolis*, 55 Ind. 515.

The majesty and sovereignty of the territory is not such that an action brought by it should suspend the rules of pleading. Issues are to be determined from the pleadings, and the right to incorporate a portion of the community known as the town of Jerome is not raised in the pleadings. This action is subject to the ordinary rules of pleading. *People v. Clark*, 4 Conn. 95; *State v. Com. Bank*, 10 Ohio, 535; *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265, and note; *Attorney-General v. Michigan Bank*, 2 Doug. 359; *People v. Richardson*, 4 Conn. 97.

STREET, C. J.—On February 9, 1899, there was filed with the board of supervisors of Yavapai County a petition signed by three hundred and fifty-two resident taxpayers of the town of Jerome, situated in Yavapai County, Arizona, stating that the town of Jerome contained a population of five hundred

or more inhabitants, and that said petitioners were two thirds of the taxable inhabitants of the town, and asking that the town of Jerome be incorporated according to act No. 72 of the Laws of 1893 of the territory of Arizona. The petition described the territory sought to be incorporated, by metes and bounds. The board of supervisors of Yavapai County received the petition, and gave public notice of its contents and the request of the petitioners, by advertising the same in two of the newspapers published at Jerome for four weeks, and set the time of hearing the petition for the eighth day of March, 1899. On the eighth day of March, 1899, the petition came on to be heard. Parties appeared for the petitioners and against the petition, and evidence was heard pro and con, whereupon the board of supervisors made the following order: "Now, therefore, in consideration of the premises, and pursuant to said act No. 72, it is hereby ordered that said town of Jerome be, and the same is hereby, incorporated, with the metes and bounds heretofore designated, and the same shall be a body politic and corporate by the name of said 'Town of Jerome,' and by said name said town and its successor or successors shall be known in law, have perpetual succession, unless disincorporated, may sue and be sued, plead and be impleaded, defend or be defended, in all courts, in all actions, suits, and matters whatsoever, and may have and use a corporate seal, and alter the same at pleasure, and enjoy and exercise all the rights, privileges, powers, duties, and franchises incident to an incorporated town." This action was brought by the attorney-general of the territory, in the name of the territory, against the town of Jerome by name, to test by the writ of *quo warranto* the legality of the corporation. The complaint does not reveal in what particular or for what reason the corporate franchise is attacked. It only alleges that within the limits of a certain county, described, a pretended municipality, styling itself the "Town of Jerome," is, and has been for more than three months last past, without any warrant or legal charter or grant, using and exercising the liberties, privileges, and franchises of a municipal town, and was exercising municipal rights, privileges, and franchises, which said privileges and franchises the said town of Jerome had usurped, and still usurps, without any right, power, or authority whatever. To this complaint a demurrer

was filed, which was overruled by the court, and the defendant answered, setting up in full and at length the order of the board of supervisors of Yavapai County, and the proceedings relating thereto, establishing the town of Jerome as a municipal corporation. To this answer a demurrer was filed, which was overruled by the court, and the cause proceeded to trial. Judgment was rendered for the defendant, maintaining the legality and the sufficiency of the franchise granted the town of Jerome by the said order of the board of supervisors under act No. 72 of the Laws of 1893 of the territory of Arizona, and the writ of *quo warranto* denied.

Before the passage of the Harrison Act (July 30, 1886) cities and towns in Arizona were incorporated by direct and special acts of the legislature. Among the many restrictions upon territorial legislation contained in the Harrison Act is the provision that the legislatures of the territories shall not pass local or special laws incorporating cities, towns, or villages, or changing or amending the charter of any city, town, or village. The legislature of Arizona, by act approved April 12, 1893, called "Act No. 72" in these proceedings, provided a general law for the incorporation of cities and towns. Such act provides that whenever two thirds of the taxable inhabitants of any town or village in the territory of Arizona containing a population of five hundred or more inhabitants shall present their petition to the board of supervisors of the county in which such town or village is situated, setting forth the metes and bounds of such town or village, and the name whereby such inhabitants desire to be incorporated, and praying for the incorporation of such town or village, if the supervisors shall be satisfied that two thirds of the taxable inhabitants of such village or town have signed such petition, such county supervisors may, by an order to be entered of record, declare such village or town incorporated. The act provides for designating the name of such village or town, giving its metes and bounds, and that henceforth the inhabitants within such metes and bounds shall be a body politic and corporate by the name designated, and by that name they and their successors shall have perpetual succession, sue and be sued, have and use a corporate seal; and further defines its rights, powers, and privileges. The assignments of error by the appellant, although variously stated, raise but two questions:

1. Was act No. 72 constitutional, so as to give the board of supervisors power to act? and 2. Did the board of supervisors comply with the act, in that the whole settlement of the town of Jerome was not incorporated?

The first objection might have been settled on the appellant's demurrer to the answer, or upon the whole facts in the case, as was finally done. The second question could only be settled upon a full hearing of the facts.

It is strongly argued by the appellee in his brief that his demurrer to the appellant's complaint should have been sustained. That demurrer sought to raise the question that the territory suing the municipality by name was such an admission of the existence of a municipal franchise that the territory was estopped from denying the existence of such franchise. That question is not before this court. The order overruling the demurrer was not appealed from. There was no final judgment following such order, and the order itself is not appealable. But we may say, in passing, that the question sought to be raised by the demurrer is not settled by uniform decisions, while a glance at the complaint itself will show that there is no allegation tending to make any such admission.

The serious question to be considered is whether the town of Jerome is legally incorporated. The public importance of that question is so great that we shall not avoid it by any refined argument as to whether the suit was properly brought or not, or whether the territory can be heard to deny the constitutionality of its own act after it has permitted a corporation to come into existence and exercise franchises by virtue of that act. When the parties interested are the territory alone and a corporation created under an act of the territory, it would seem to be inconsistent with good faith for the territory to call upon the corporation to show by what authority it exercises a franchise, and then to reply that, although the corporation exercises such franchise through the direct act of the territory, yet such act was ineffective to create that franchise. It would be the plain duty of the territory, if such were the case, to correct the errors, and to grant them a new franchise if the old power was inefficient. If the question were raised by a party other than the territory, it would be a different situation. Any one affected by the exercise of

a corporate franchise may have the right to test the legality of the franchise, except he who grants it.

Appellant contends that act No. 72 was unconstitutional, because it did not provide for due process of law, inasmuch as it contained no provision for giving notice to those who were interested, and undertakes to settle the question by determining whether the act of the board of supervisors was judicial or legislative in its nature. So far as the determination of this case is concerned, it is not necessary to characterize the act by either one of those names, or to determine whether it be judicial or legislative. The legislature of the territory of Arizona, the same as any other legislature when not otherwise restricted, has the right to create, enlarge, and restrict municipal franchises, and especially those municipal franchises which look to the government of a portion of the people. It has a right to enlarge or curtail the territorial boundaries of a municipal corporation. It has a right to do that quickly, instantaneously, without notice to anybody. By doing so it is not a trespass upon any constitutional guaranty as contained in the constitution of the United States. It was not necessary for the legislature, in passing a general act, which may be complied with and must be complied with by every community seeking to be incorporated as a city or town, to provide for the publication of notice or issuing of summons to any one, or the giving of any notoriety to what two thirds of its taxable inhabitants demand. The incorporation of a municipal body, a village, a town, or a city has never been regarded as imposing taxes upon people, in the sense of taking property for a public use or taking property without due process of law, if all parties were not notified by publication or otherwise. They are different from the private or quasi public corporations which have for their purpose the levying of taxes to create an improvement for the benefit of the property of those who reside within the limits of a certain district, and the rule which pertains to legislative acts creating such districts has no application to municipal corporations. Act No. 72 in that particular violates no provisions of the constitution of the United States or the act of Congress controlling territorial legislation.

As to the second class of errors complained of, to wit, that the board of supervisors did not have the power to incor-

porate a portion of the town,—that all the people of the town would have to be incorporated,—the position taken by the appellant is untenable. There can be no reason why a portion of a community may not ask to be incorporated as a municipal body, and leave out a portion of the community. The statute, in its reading, contains no such provision or suggestion. Under the evidence and the facts in this case, it is not determinable how many people constituted the community, and how many of the members of the community did not take part in the proceedings for incorporation. All the board of supervisors need look into in hearing and granting such petition is to ascertain whether the petitioners live within the territory described in the petition by metes and bounds, and whether they constitute two thirds of the taxable inhabitants within such metes and bounds. There is nothing in the law which would prevent a community divided by a natural or artificial line from incorporating themselves into two or more municipal corporations, instead of into one, although the community as a whole may be said to be but one community. This would naturally be the case if a community were separated by a county line. It has frequently been the case where they were separated by a stream of water,—two municipal corporations existing, one on one side of the stream, and the other on the other side of the stream. It is frequently the case that when a community undertakes to incorporate themselves into a municipality a large portion or all of the inhabitants within a certain territory are desirous of incorporating, while those who live on the outside of that territory do not wish to come into the corporation; and yet in such case it is perfectly proper and within the purview of the statute to allow the inhabitants within the territory who desire to become incorporated to present their petition, with metes and bounds, and ask the board of supervisors to establish for them a municipal corporation. The record does not show that anybody living without the limits of the corporate line of Jerome is complaining that they have not been brought into the corporation. If they have not been brought into the corporation, they are not injured; they can ask to be annexed. Under any circumstances, it is one of those cases where nobody has been injured. If the action of the board of supervisors was a nullity for the reasons stated by the appellant, it would be be-

cause of some statute. Our attention has not been called to the provisions of such a statute, and it is safe to say that no statutory provision has been disregarded in that particular. The judgment of the district court is affirmed.

Doan, J., and Davis, J., concur.

[Civil No. 757. Filed March 22, 1901.]

[64 Pac. 492.]

In the Matter of the Guardianship of the Persons and Estate
of AARON HUGO ZECKENDORF and HELENITA
ZECKENDORF.

1. COURTS—JUDGMENTS—VACATION—POWER—NONE AFTER EXPIRATION OF TERM.—A court has no power to set aside or vacate its own judgment after the expiration of the term at which the judgment was rendered.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Francis J. Heney, and Rochester Ford, for Wards and Appellants.

S. M. Franklin, for Guardian and Appellee.

STREET, C. J.—On July 2, 1892, the probate court of Pima County rendered its decree settling the final account of Louis Zeckendorf, guardian of the persons and estate of Aaron Hugo Zeckendorf and Helenita Zeckendorf. From that decree the wards took an appeal to the district court of Pima County. On February 19, 1894, the district court rendered a decree in said matter, from which decree Louis Zeckendorf appealed to the supreme court of Arizona. On July 10, 1895, the supreme court of Arizona rendered its judgment in the cause, wherein it was ordered and adjudged as follows, to wit: "It is ordered, adjudged, and decreed that the judgment and decree of the lower court in this cause be, and the

same is hereby, reversed, and this cause is remanded, and the court below is hereby directed to enter judgment in this cause in accordance with the judgment of the probate court of Pima County made and entered in this cause, and being that certain judgment and order made by said court on July 2, 1892, in this cause, allowing and settling the final account of said Louis Zeckendorf, guardian of the persons and estate of Aaron Hugo Zeckendorf and Helenita Zeckendorf (formerly minors), from which said judgment and order appeal was taken from said probate court to the district court of the first judicial district of the territory of Arizona, in and for Pima County, and from the judgment and decree from said cause in said district court this appeal was taken, except as to the item of five hundred and four (\$504) dollars for board of Aaron Hugo Zeckendorf, evidenced by voucher 69½, of date December 21, 1883, allowed by said probate court, is hereby disallowed, and such disallowance shall be entered in the judgment and decree of said lower court." An appeal was taken by the wards to the supreme court of the United States from the decree entered by the supreme court of Arizona. No *supersedeas* bond was filed. A *remittitur* was issued out of the supreme court of Arizona to the district court of Pima County in accordance with the judgment rendered by said court; and on the eleventh day of December, 1895, the district court did enter and render its judgment and decree in accordance with the judgment of the territorial supreme court. The judgment of the supreme court of Arizona was affirmed by the supreme court of the United States on the twenty-fourth day of October, 1898 (43 L. Ed. 1179, 19 Sup. Ct. 882), and a mandate in accordance therewith was filed with the supreme court of Arizona on March 16, 1899. A further *remittitur* issued out of the supreme court of Arizona on the sixth day of February, 1900, directed to the district court of Pima County. On March 10, 1900, the said wards filed in the district court their motion to vacate and set aside the judgment rendered by the district court on December 11, 1895, which motion came on for hearing on November 28, 1900; and upon the objection of Louis Zeckendorf, guardian, such motion was denied. From this order denying said motion the wards have appealed to this court.

The only error assigned is that the court erred in denying the motion to set aside the judgment of December 11, 1895.

It is the universal rule that a court has no power, on motion, to set aside or vacate its own judgment after the expiration of the term at which the judgment was rendered. If the judgment has been rendered by mistake or through fraud, or if for any reason it is voidable, it can be set aside by a bill filed for that purpose. The power of courts to deal with their judgments after the expiration of the term is clearly set out in *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797: "In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and, if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record; and they may be then set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court." Also in *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; Freeman on Judgments, sec. 70. The district court committed no error in refusing to vacate and set aside, on a motion made in March, 1900, a judgment rendered in December, 1895, after the expiration of the term at which the judgment was rendered, and after the lapse of many succeeding terms. The order of the district court is affirmed.

Doan, J., concurs.

[Civil No. 744. Filed March 23, 1901.]

[64 Pac. 494.]

THOMAS P. BIGGS et al., Plaintiffs and Appellants, v. THE UTAH IRRIGATING DITCH COMPANY et al., Defendants and Appellees; ELWOOD HADLEY, United States Indian Agent, Intervener and Appellant.

1. WATER AND WATER-RIGHTS—IRRIGATION—UNINCORPORATED ASSOCIATION—MEMBERS—STATUS—TENANTS IN COMMON.—The *status* of the members of an unincorporated irrigating ditch company, in so far as the dam and ditch, the property of the association, is concerned, is that of tenancy in common.
2. SAME—SAME—SAME—TITLE TO DITCH—APPROPRIATION.—There is a clear distinction between the property of an unincorporated irrigating ditch association, which consists of the dam and ditch, and which is held in common by the members of the association, and the right of appropriation which each member thereof has by virtue of being the owner or possessor of land irrigated by water from the river by means of such dam and ditch.
3. SAME—SAME—SAME—CERTIFICATES OF STOCK—CONTRACTS—APPROPRIATION—TRANSFER.—Where an unincorporated irrigating ditch company issued to its members certificates which were treated by the members as evidencing their titles to the dam and ditch the property of the association, their right to a voice in the management and control of the property, and also the amount and extent of the appropriation of water by each, or at least as evidencing the measure of their right in times of scarcity, such certificates are evidences of the contract between the several members constituting the association, not only as to the ditch and dam, but as to the distribution of the water diverted thereby, and the sale and alienation thereof is in effect a conveyance not only of the interest in the dam and ditch but as well the water-right owned and possessed by the original holder thereof.
4. SAME—SAME—SAME—SAME—APPROPRIATOR—PRIORITY—GOVERNS IN ABSENCE OF CONTRACT—WATER-USERS UNDER A COMMON DITCH MAY CONTRACT AMONG THEMSELVES AS TO METHOD OF SERVICE.—Independent of any statutory provision upon the subject, wherever the right of prior appropriation of water is recognized and enforced, each appropriator of water under a ditch, whether such ditch be held in common or owned by a corporation, is entitled, in the absence of a contract between the owners of the ditch, to be supplied in the order of his priority of appropriation. But this right is a property right and one which may be the subject of contract, and there is no statute in this territory which prevents

appropriators of water by means of a common ditch from agreeing among themselves as to the manner in which they may enjoy their several appropriations.

5. ~~SAME—SAME—SAME—PRIORITY—ACCORDING TO OLDEST TITLES LIMITED TO PUBLIC DITCHES—PRIVATE DITCHES—PRIORITY DETERMINED BY APPROPRIATION AND USE—REV. STATS. ARIZ. 1887, PARS. 3201, 3215, 3223, CONSTRUED.~~—Paragraph 3215, *supra*, providing that the oldest land titles shall have precedence always in the use of water in times of scarcity, in its strict application must be limited to public ditches. Paragraphs 3201, 3215, and 3223 together, so far as private ditches are concerned, are to be construed as declaring that not mere priority of diversion, but priority of use and appropriation of water upon particular lands, shall govern in determining conflicting rights.
6. ~~SAME—SAME—SAME—MEMBERS—APPROPRIATION—SALE—CHANGE OF USE—APPLICATION OF WATER TO LAND OTHER THAN THAT FOR WHICH ORIGINALLY APPROPRIATED—REV. STATS. ARIZ. 1887, PARS. 3201, 3215, 3223, CONSTRUED.~~—The statutes, *supra*, while recognizing the ownership and possession of land as essential to the acquisition and enjoyment of a water-right for purposes of irrigation, and while limiting its use to the particular lands to which it is attached, do not deny the right of alienation and the transfer of such right from one particular tract of land to another, except under the limitations that the transferee is of the class of persons entitled to make a valid appropriation by virtue of being the owner or possessor of arable and irrigable land, and that such change does not injure another having rights which have accrued at the time of such transfer and change of use.
7. ~~SAME—SAME—SAME—SAME—ESTOPPEL—DALTON v. RENTARIA, 2 ARIZ. 275, 15 PAC. 37, CITED.~~—Where certain holders of certificates in an unincorporated ditch company, which represented an interest in the ditch and water diverted thereby, sold such certificates to persons who located under an extension of the canal, and these transferees up to the time of the commencement of the suit, being from eight to sixteen years, with the acquiescence of the other holders of certificates, have enjoyed the same use of water, and the same equal division in times of scarcity, and have reclaimed and cultivated lands under the belief that they had an equal right to water, those who retained their certificates and original holdings are thereby estopped from asserting a priority of right in themselves.
8. ~~SAME—SAME—PRESCRIPTION.~~—Where certain Indians acquired rights to water from a canal by labor in the construction and maintenance of the canal, without becoming shareholders, and have been accorded such rights for twenty years or more, those rights are in their nature prescriptive, and a judgment apportioning them water in accordance with the amount shown to have been used, upon

condition that they shall perform labor and contribute a proportionate amount toward the expense of maintenance, as they have been accustomed to do, is not unreasonable or erroneous.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa, Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

W. H. Stilwell, and E. W. Lewis, for Appellants.

Paragraph 3199 of the Revised Statutes of Arizona provides: "All rivers, creeks, or streams of running water are hereby declared public, and applicable to the purposes of irrigation and mining as hereinafter provided." A mere diversion of water does not constitute an appropriation. *Clough v. Wing*, 2 Ariz. 371, 17 Pac. 453; *Farmers' High Line Canal Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028; *Schilling v. Rominger*, 4 Colo. 109; *Thomas v. Gueiana*, 6 Colo. 553; *Sieber v. Frink*, 7 Colo. 149, 2 Pac. 901; *Wheeler v. Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487.

Appropriation of water consists in the intention, accompanied by reasonable diligence, to use the water for the purpose originally contemplated at the time of diversion. *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809.

The right to the use of water is the essence of appropriation; the means by which it is done is incidental. *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809.

An appropriator of water from a stream already partly appropriated acquires right to the surplus or residue appropriated. *Colorado Milling Co. v. Larimer Irr. Co.*, 26 Colo. 47, 56 Pac. 185.

Because in such case each, with respect to his particular appropriation, is prior in time and exclusive in right. *Water Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685.

Appropriation is a right collateral to right under contract. *San Diego Land etc. Co. of Maine v. Sharp*, 97 Fed. 394.

It is not determined by the size, but by the amount actually applied to beneficial use. *Millheiser v. Long*, 10 N. Mex. 99, 61 Pac. 113.

In Arizona, as in New Mexico, where was decided the case last cited, priority of appropriation must govern, and water-

rights must be determined by it. The case just referred to is from the supreme court of New Mexico, and embraces a full discussion of the question of appropriation and the acts necessary to establish same. No other state or territory embracing any of the arid portions of the United States can be said to stand so nearly in the position of Arizona regarding the question of public waters as does the territory of New Mexico. *United States v. Rio Grande etc. Co.*, 174 U. S. 690, 19 Sup. Ct. Rep. 770.

The consumer, by reason of his application of the water to a beneficial use, is said to be an appropriator. *Wright v. Platte Valley Irr. Co.*, 27 Colo. 322, 61 Pac. 603.

An actual diversion and use is necessary to complete an appropriation. One of the essential elements of a valid appropriation of water is the application thereof to some useful industry. To acquire a right to water from diversion thereof one must within a reasonable time employ the same in the business for which the appropriation is made. *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 903; *Ophir M. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Kelly v. Natoma Water Co.*, 6 Cal. 105.

When rights for appropriation are once vested, they must be held and protected, unless abandoned. *Malad Valley Irr. Co. v. Campbell*, 2 Idaho, 411, 18 Pac. 52; *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198.

When the taking and appropriation are plain, yet the use is held to be an individual right. *Tenem Ditch Co. v. Thorp*, (Wash. Ty.), 20 Pac. 588.

And this was subsequent to the incorporation of the ditch interests by the tenants in common.

Said the court in the case of *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32: "It has been a mistaken idea . . . that he who has diverted or 'claimed' and filed a claim of water for any number of given inches has thereby acquired a valid right, good as against all subsequent persons. It is only when diversion is accompanied by application to some beneficial use that water is appropriated so as to prevent a subsequent appropriator from acquiring its use."

In *Millheiser v. Long*, 10 N. Mex. 99, 61 Pac. 113, the court says: "Diversion without application to beneficial use is simply turning water . . . into a new channel and creating

a monopoly. Water of a stream does not belong to the party diverting it alone. Then there would be but one appropriator and all others upon such stream must pay tribute to the person making the first diversion. This," said the court, "is not law covering water-rights in this territory [New Mexico], where the waters of natural streams are declared to be free to those who apply them to a beneficial use until all are thus appropriated."

Diversion of water not consumed must be returned. *Weiss v. Oregon etc. Co.*, 13 Or. 496, 11 Pac. 255.

The transfers of certificates of defendant association, as shown by the testimony in this case, cannot be considered as a transfer of any interest in the ditch owned by the individuals owning the ditch.

The present case should be controlled by the rule laid down by the court of Utah in the case of *Lehi Irrigation Co. v. Moyle*, 4 Utah, 327, 9 Pac. 867, which gives to newcomers, admitted by tacit consent to the use of the ditch, the right to appropriate and convey water through the ditch for beneficial uses without deed or other evidence of conveyance of interests in such ditch, and that each increased use of water through the ditch must be taken and considered as a new appropriation thereof.

Thus the size of the ditch merely does not determine an appropriation of water, but the amount actually applied to a beneficial use. *Millheiser v. Long*, 10 N. Mex. 99, 61 Pac. 113.

Such amount is also the test for the size of the right of way for the ditch. *Riverside Land and Irr. Co. v. Jansen*, 66 Cal. 300, 5 Pac. 486.

The transfer of certificate shown by the evidence in the case cannot be considered a transfer of any interest in the water flowing in said ditch: 1. Because there is no evidence that those who parted with certificates of the defendant association had any right to the use of water in the Utah canal; 2. That there is no evidence that in the transfer of such certificates there was an intention to abandon, transfer, or dispose of any rights to the use of water in the Utah canal; 3. That a sale of water, or diversion of water for sale, in the territory of Arizona is not a beneficial use. Act of Congress March 3, 1891; *San Diego County v. Sharp*, 97 Fed. 399; *Manning v. Fife*, 17 Utah, 232, 54 Pac. 111.

A diverter of water cannot give away or dispose of any surplus waters to the injury of subsequent appropriators. *Manning v. Fife*, 17 Utah, 232, 54 Pac. 111; *Creek v. Waterworks Co.*, 15 Mont. 121, 38 Pac. 459; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278; *Barnes v. Sabron*, 10 Nev. 217; *Kinney on Irrigation*, sec. 231; *Hague v. Irrigation Co.*, 16 Utah, 421, 67 Am. St. Rep. 634, 52 Pac. 765; *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475, 1025; *Müllheiser v. Long*, 10 N. Mex. 99, 61 Pac. 117.

Baker & Bennett, and Joseph Campbell, for Appellees.

It would be inequitable and unjust to deprive these defendants of this water and give it back to the settlers upon the original twenty-four quarter-sections. Especially when these settlers on the twenty-four quarter-sections sold a large portion of their shares for large sums of money, and for more than twelve years permitted the water of the canal to be distributed *pro rata* per share to the shareholders, and allowed these vendees to yearly contribute to the keeping up and maintaining of said canal and dam. *Bloom v. West*, 3 Colo. App. 212, 32 Pac. 846; *Oppenlander v. Left-Hand Ditch Co.*, 18 Colo. 142, 31 Pac. 854; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278; *Larimer and Weld Co. v. Cache La Poudre Co.*, 8 Colo. App. 237, 45 Pac. 525; *Wyatt v. Larimer and Weld Irrigation Co.*, 1 Colo. App. 480, 29 Pac. 906; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777 and note, 45 Pac. 472.

Robert E. Morrison, U. S. District Attorney, and Thomas D. Bennett, Assistant U. S. District Attorney, for Intervener.

SLOAN, J.—The essential facts in this cause which appear from the record are as follows: In the year 1877, twenty-four families emigrated from Utah, and settled upon twenty-five quarter-sections of public land, lying on the south side of the Salt River, near what is now known as the "Village of Mesa," in Maricopa County. During the same year, the people composing this little colony constructed a dam and ditch for the purpose of diverting and conveying from the Salt River water for the reclamation and irrigation of the lands held by them. The ditch thus constructed had a carrying capacity

of twenty-five hundred inches, miners' measurement, and was named and known thereafter as the "Utah Irrigating Ditch." Soon after the completion of the dam and ditch the occupants and possessors of the twenty-five quarter-sections of land organized an association, and adopted rules and by-laws governing the same, for the purpose of controlling, caring for, and managing the affairs of the Utah irrigating ditch, and to provide for the proper distribution of water to the lands held by them from the said ditch. The association was named, and has ever since been known as, the "Utah Irrigating Ditch Company." The company issued to each of its members, as an occupant of one of the said quarter-sections of land, a certificate of membership as an evidence that each holder of such certificate was entitled to participate as a member of said association. Under the rules and regulations, and in accord with the original intent of the builders of the canal, the water diverted by means thereof was apportioned among the holders of the certificates upon the basis that each holder of a certificate was entitled to one twenty-fifth part of the whole. During the year 1879 the president of the United States set apart, for the use and benefit of certain Indians, seven quarter-sections of public land lying under said ditch, and, in consideration of said Indians performing labor and work upon the ditch, the members of the Utah Irrigating Ditch Company granted to said Indians the right to the use of the ditch, and permitted them to take water from the said ditch for the irrigation of the land so set apart and held by them, and thereafter recognized the right of said Indians to an interest in said ditch; but no certificates were issued to them, nor were they permitted to participate in the proceedings and deliberations of the association. During the year 1882 the Utah ditch was enlarged, and seven individuals holding land under the ditch, and who were not members of the original association, were granted certificates, thus making the total number of certificates thirty-two instead of twenty-five, and these holders of these additional certificates were permitted to participate in the affairs of the association, and to enjoy the use of said ditch and the water flowing therein, to the same extent, and upon the same terms, as the holders of the original certificates. In the year 1883 the association recalled the certificates of membership theretofore issued, and issued in

their place, instead, one hundred and twenty-eight certificates, being four certificates for each original certificate, and gave to the holder of each of the latter certificates one vote in the proceedings of said association. The effect of this was to subdivide the certificates upon the basis of one to each forty acres, instead of one to each one hundred and sixty acres, as originally provided. During the year 1887 certain occupants and possessors of land upon what is known as the "Mesa," lying to the south and west of the lands occupied by the builders of the Utah ditch, organized what was known and called the "Alamo Irrigating Ditch Company." The latter company entered into an agreement with the Utah Irrigating Ditch Company by the terms of which the former was permitted to enlarge and extend the Utah ditch so as to permit the diversion of water from the Salt River and the carriage of the same to the lands held by members of the Alamo Irrigating Ditch Company. It was agreed between the two companies that the water which might flow in the ditch after the enlargement and extension of the same should be divided in the following manner: The Alamo Irrigating Ditch Company was to have the right to six sixteenths of the entire amount of water in the enlarged ditch, except that the Utah Irrigating Ditch Company should at all times have the right to the use of three thousand inches of water at times when ten sixteenths of the entire amount flowing in said canal should not approximate that amount; that is to say, the division of the water upon the ratio of six sixteenths to the Alamo Company and ten sixteenths to the Utah Ditch Company was to be had only at such times when the ten sixteenths would amount to three thousand inches of water. At all other times the Utah Ditch Company was to enjoy the prior right to the use of the water flowing in the canal, to the amount of three thousand inches. It appears from the evidence that, after the increase in the number of certificates of membership in the Utah Company was enlarged from thirty-two to one hundred and twenty-eight, many of the holders of these certificates sold or assigned a part of them to persons who had settled upon lands upon the Mesa, and under the extension of the canal made by the Alamo Company, and that ultimately sixty of these certificates had been so sold and assigned. It also appears that from the time when these transfers were first made, beginning with the

year 1887 and extending down to the year 1899, the holders of these assigned certificates participated in the affairs of the Utah Irrigating Ditch Company, and enjoyed all the rights in the use of water from the ditch held and enjoyed by the original holders who occupied the lands first irrigated from the ditch; that is to say, the water flowing in the ditch during times of scarcity was divided *pro rata* among the holders of the one hundred and twenty-eight certificates, without regard to whether the lands irrigated constituted the original twenty-five quarter-sections, or were lands subsequently located and taken up upon the Mesa. No question was raised as to the right of the holders of the Mesa lands who were holders of the Utah Irrigating Company's certificates to the use of water flowing in said ditch upon an equality with the holders of the certificates who held and possessed lands under the original ditch, until the year 1899, when the plaintiff Thomas P. Biggs and thirteen other persons, certificate-holders and the owners of land under the original ditch, brought this suit against the Utah Irrigating Ditch Company, Jedediah Johnson, William M. Dobson, and Edward E. Jones, as directors, and Thomas E. Jones, water master, and H. C. Rogers, James Johnson, John S. Watrous, and E. E. Jones, for the purpose of having declared that the owners of the lands first cultivated under the Utah ditch were entitled to a preference over the owners of the lands under the extension to the use of water diverted by the canal during seasons of scarcity, and to enjoin the Utah Irrigating Company and its officers from diverting from said lands of plaintiffs to the Mesa lands water during said seasons of scarcity. The theory upon which plaintiffs brought their suit was that the lands originally irrigated from the Utah ditch possessed a prior right of appropriation over the lands subsequently taken up and reclaimed under the extension. The answer put in by the defendants to the complaint set up that, after the issuance of the one hundred and twenty-eight certificates in lieu of the original thirty-two, many of the holders, among whom were some of the plaintiffs, sold, assigned, and transferred certificates held by them to certain persons, who thereby became members of the association, and who upon said purchases, with the knowledge and consent of the vendors, ever since the year 1883, have applied upon the lands held and owned by them the *pro rata* amount

of the water called for in said certificates, to wit, the one one hundred and twenty-eighth part; that at the time said assignments of said certificates were made the said vendors thereof represented to said vendees that, by virtue of the ownership of said shares, the holders thereof were entitled to receive from said canal a *pro rata*,—to wit, one one hundred and twenty-eighth part,—of the water flowing therein for each share in said canal; that upon the strength of such representations, and for no other reason, said purchases were made, and said vendees thereafter expended large sums of money in preparing their land for cultivation, building improvements thereon, and in settling upon the same; that there is no other means of conveying said water upon said lands except through and by said Utah canal. Upon the filing of the complaint, Elwood Hadley, as United States Indian agent, was permitted to intervene in the action in behalf of the Indian holders of land under the Utah canal, and who had been users of water from the same. The cause was heard by the court, and judgment rendered for the defendants as against the plaintiffs, dismissing the action.

Upon the complaint in intervention, the court entered the following decree: "That there be apportioned and delivered to the interveners, the Pima and Maricopa Indians, by their agent duly appointed by the United States, a sufficient amount of water to irrigate their lands in sections 35 and 36, not to exceed $1/10$ part of the water flowing in the Utah irrigating canal, for distribution to the holders of shares or water-rights in the said Utah irrigating canal, for the use of said Indians in the irrigation of the lands occupied by them irrigable from said canal, upon condition that the said Indians perform $1/10$ part of the work and labor and pay $1/10$ part of the necessary expense incurred and paid by the said Utah Irrigating Canal Company in the maintenance of the said Utah irrigating canal and the said dam by means of which the water from the said Salt River is diverted into said canal." From the judgment dismissing the complaint the plaintiffs have appealed, and from the decree above recited, entered upon the issues raised by the intervener, said intervener has appealed to this court.

The assignments of error made by the appellants are numerous. Many of these pertain to rulings of the court, made

during the trial of the cause, in the rejection or admission of evidence over the objections of appellants. Others pertain to the alleged errors in the findings of the court, and in the conclusions of law drawn therefrom, while the remainder attack the judgment of the court as not being supported by the facts and findings. Such of the assignments as pertain to the admission or rejection of evidence need not be considered, for the reason that they concern matters which are not determinative of the rights of the plaintiffs. Our examination of the record shall therefore be restricted to the consideration of the findings and judgment dismissing plaintiffs' complaint, and to the inquiry as to whether, under the settled rules of this court, these findings are sufficiently supported by the evidence, and as to whether they support the judgment.

The findings of the court which we shall consider, and which we regard as important, are these: "(3) That in the year 1882 said Utah canal was enlarged, and seven additional shares, or water-rights, were issued by said organization to the parties making such enlargement, and were numbered from 26 to 32, inclusive; that in the year 1883 said original thirty-two certificates were divided into four parts, and new certificates were issued to the number of one hundred and twenty-eight, and were delivered to the holders of the original thirty-two shares; that this was done by said association with the knowledge and consent of all the members thereof. (4) That from the time the canal was first constructed, and water carried therein, continuously up to the date of the commencement of this suit, the water flowing in said canal was distributed to the members of said organization who were holders of said certificates or shares, *pro rata*, according to the number of shares held by each. (5) That many of the holders of the original thirty-two shares, subdivided into one hundred and twenty-eight since said subdivision was made, sold and transferred some of said shares, and the interest in said canal and the water flowing therein, represented thereby, to parties other than the occupants of the aforesaid twenty-five quarter-sections, and with the knowledge and consent of said vendors said parties applied the water derived from said shares upon lands owned and occupied by said vendees other than said original twenty-five quarter-sections, and by means of the water derived from the ownership of said shares in said canal

have for many years, varying from eight to sixteen years, irrigated and cultivated said lands, and have made valuable improvements thereon, and have built houses for themselves and their families, thereon reside, and which they now cultivate."

It is admitted in the pleadings that the original settlers upon the twenty-five quarter-sections of land held their water-rights in the Utah ditch as co-appropriators, having equal rights to the use of water appropriated by means of the canal to the extent of their needs. It also appears, not only from the pleadings, but also from the testimony put in by the plaintiffs, that after the organization of the Utah Irrigating Ditch Company, and the issuance of the original certificates, each holder thereof was regarded by the other holders as owning a one twenty-fifth part in the dam and ditch, and as entitled to a one twenty-fifth part of the water diverted by means thereof in the irrigation of his quarter-section of land. It is also shown by the evidence that after the first enlargement of the canal, and the issuance of the seven additional certificates, no distinction was made between the holders of the latter and the holders of the former certificates in the use and distribution of water and in the management and control of the canal; the latter holders having been accorded the same rights as the original holders. Each must therefore be considered a tenant in common in the ownership of the ditch, and a co-appropriator of water with the others, and therefore no question of prior appropriation can now be raised as between the holders of these original thirty-two certificates, unless the law be, as contended for by counsel for appellants, that the statutes of the territory regulating water-rights are to be construed as conferring upon the first user of water from a common source against a subsequent user, notwithstanding an agreement between them, acquiesced in by both, that no priority of right shall appertain. The soundness of this contention will be considered hereafter. Thomas P. Biggs, one of the plaintiffs, testified that, after the issuance of one hundred and twenty-eight certificates in lieu of the thirty-two original certificates, each holder of a former certificate was permitted and was accorded the right of drawing one one hundred and twenty-eighth part of the water flowing in the canal for the irrigation of his land. W. A. Daggs, another witness for the

plaintiffs, also testified that the object of the association in issuing the one hundred and twenty-eight certificates in lieu of the thirty-two certificates was to give each person holding a certificate a right to vote on the management of the property of the association, and the right to say who should hold office, and to give to each holder of a certificate the right to have carried through the ditch water according to his *pro rata* right to take water. It follows from this evidence that each certificate represented an interest held by the holder thereof in the dam and canal, and further that, by the consent and acquiescence of all the members, the distribution of water flowing in the canal was made upon the basis of the holding of each member of these certificates, rather than upon his holding of land. Prior to the extension of the Utah canal, in 1887, it appears from the testimony that many of these certificates had been sold or assigned by the holders thereof to persons who were not the owners of the original twenty-five quarter-sections of land irrigated by the old ditch, but that after the extension of the canal many of these persons settled upon lands upon what is known as the "Mesa," and reclaimed and irrigated the same with water from the Utah ditch; that others, about the time of the extension of the ditch and subsequent thereto, purchased other certificates, and proceeded to reclaim and irrigate land under the extension by means of water from the Utah ditch. It is the *status* of these holders of certificates as appropriators of water, with regard to the holders of the original twenty-five quarter-sections of land, which is involved in this suit. It is admitted by the plaintiffs that these holders of certificates have participated in the management and control of the Utah Irrigating Ditch Company. In fact, it is admitted that these holders have at times controlled the company's affairs and elected its officers. Their right to thus participate in the affairs of the association has never, and is not now, questioned. The evidence is conflicting as to whether these holders of certificates under the extension of the canal were recognized by the other certificate holders as having the right to prorate with them in the distribution of the water during times of scarcity, the same as though holders of the original twenty-five quarter-sections of land. Testimony on the part of the defendants supports the finding of the court in this regard. In addition to this testimony, the

contract entered into between the Utah Irrigating Ditch Company and the extension company, called the "Alamo Irrigating Ditch Company," under which the extension of the Utah ditch was made, and which is dated the eighth day of October, 1887, contained the provision "that when, in consequence of the low condition of Salt River or the scarcity of water therein, the said Utah Irrigating Canal Company shall be unable, with reasonable diligence, to take from the Salt River into its canal more than the 3,000 miners' inches to which said company is first entitled, then the party of the second part, or the parties composing the same, unless they shall be interested in the Utah Irrigating Ditch Company, will not be permitted to take, hold, or use any water from the said Utah irrigating ditch." As the holders of the certificates were the only persons interested in the Utah Irrigating Ditch Company, and as none of the holders of such certificates who appear here as plaintiffs had any interest in the Alamo Irrigating Ditch Company, the language used in the contract, "unless they shall be interested in the Utah Irrigating Ditch Company," must be taken to refer to the purchasers or assignees of certificates who occupied lands apart from the original twenty-five quarter-sections, and must be construed as an acknowledgment on the part of the Utah Irrigating Ditch Company that such persons, by virtue of their ownership of such certificates, were interested as owners in the Utah Ditch Company by virtue thereof entitled to share in the distribution of the three thousand miners' inches accorded by the terms of the contract to the members of the Utah Company under their prior appropriation. Thomas P. Biggs, one of the plaintiffs, and who testified to the effect that the holders of the assigned certificates, unless holders of the original twenty-five quarter-sections of land, were not accorded the right of prorating with the latter in times of scarcity in the irrigation of their lands, was one of the signers of said contract in behalf of the Utah Irrigating Ditch Company. We think the finding of the court that the water flowing in the Utah canal was continuously, up to the date of the commencement of the suit, distributed to the members of the association who were holders of certificates, *pro rata* according to the number of shares held by each, whether the holders were owners of the original twenty-five quarter-sections of land or not, is fully sustained by the evi-

dence. It also appears from the testimony that many of the holders of these certificates purchased them from the original holders, with the expressed purpose of taking up land under the extension, and reclaiming and irrigating the same from the Utah ditch through the extension, with the understanding that by means of such purchases they acquired equal rights, in the distribution of water from the Utah ditch through the extension, with those holders of certificates who occupied the original twenty-five quarter-sections of land, and that after said purchases were made they proceeded to reclaim, cultivate, and improve the land so taken up by them, and that until the commencement of this suit they enjoyed equal rights in the distribution of the water with the holders of said twenty-five quarter-sections. The finding of the court in this regard is likewise abundantly supported.

The Utah Irrigating Ditch Company is not an incorporated company. The *status* of its members, therefore, in so far as the property of the association is concerned, is that of tenancy in common. One of the incidents of tenancy in common is that a change in its membership does not affect the relations of the tenants, and that each tenant may sell or encumber his interest at pleasure, without regard to the knowledge, consent, or wish of his co-tenant. So far, therefore, as the mere property of the association is concerned, each member had the right to sell or assign his interest, or any portion thereof, as he saw fit, with or without the consent of the other members, and the purchasers of such interest or interests succeeded to all the rights of the vendors in the property of the association. Undoubtedly there is a clear distinction between the property of the association, which consisted of the dam and ditch, and which were held in common by the members of the association, and the right of appropriation which each member thereof had by virtue of being the owner or possessor of land irrigated by water from Salt River by means of such dam and ditch. The appropriation made by the members was distinct from the means by which that appropriation was made effective. It is conceded that the certificates issued by the association to its members were treated from the beginning as evidencing in the holders a right to participate in the affairs of the association and in the management and control of its property. Each certificate, therefore, must be taken as, in a

sense, constituting a muniment of title to an interest in the property of the association, and its assignment carried with it the evidence of ownership of such interest. In addition to this, it is clear that the holders of these certificates regarded them not only as evidence of their ownership in the property or the association, but also as an evidence of the amount and extent of the appropriation of water which each holder possessed, or, at least, as evidencing the measure of the right of each holder to share in the distribution of water in times of scarcity. These certificates must be construed as evidences of the contract between the several members constituting the association, not only as to the property of the association held as tenants in common, to wit, the dam and canal, but also as to the contracts between the members of the association with regard to the distribution and division of the water which might be diverted in times of scarcity by means of such dam and ditch, and thus, in effect, as constituting what are ordinarily termed "water-right contracts"; and the sale and alienation of these, in keeping with the evident intent and purpose of the holders thereof making such transfers, and the purchasers or assignees of the same, were in effect conveyances, not only of the interest of the holders in the property of the association evidenced by the certificates, but as well the water-rights owned and possessed by the original holders thereof.

Do the findings of the court, supported, as they are, by the evidence in the cause, sustain the conclusion drawn by the court that each holder of a certificate in the Utah Irrigating Ditch Company is entitled to have and receive upon the lands used and occupied by him, through the Utah irrigating canal or its extension, during times of scarcity, an equal part,—to wit, one one hundred and twenty-eighth,—of the water flowing in said canal, without regard to the land which he may occupy? It must be conceded that in the absence of a contract between the owners of a ditch, whether that ditch be held in common or be owned by a corporation, each appropriator of water under said ditch is entitled, in times of scarcity, to be supplied in the order of his priority of appropriation. Independent of any expressed provisions of our statute on the subject, this is the settled doctrine wherever the right of prior appropriation of water is recognized and en-

forced. Is this right one which may not be the subject of contract among appropriators, or which may not be affected by any principle of equitable estoppel? The right of appropriation is a property right, and one which may be the subject of contract. We are able to find nothing in our statutes which is to be construed as in anywise affecting the right of appropriators of water, by means of a common ditch, to agree among themselves as to the manner in which they may enjoy their several appropriations.

The general doctrine that a water-right may be the subject of contract apart from the land to which it has been applied must be understood, in the case of sale or alienation, as being always subject to the acquired rights of others to the use of water from the common source. The purchaser succeeds to the rights of his vendor, and the measure of his right is the appropriation made by the vendor, when no change in the place of diversion or application in the use of water follows from such conveyance. When, however, the water-right purchased is sought to be applied upon other lands, the purchaser may change the use to the same extent and as fully as the original water-right holder might do. If such change does not result in decreasing the amount of water available to another water-right holder under the latter's appropriation, then such change may be made, otherwise not. A prior appropriator may change his appropriation from one tract of land to another when he applies the water to lands he owns or possesses, and when this does not involve an injury to another appropriator. If A, the owner of a water-right attached to and capable of irrigating one hundred acres of land, sells a one-half interest in such water-right to B, the owner or possessor of fifty acres of land, the latter succeeds to the right of A to the extent of his purchase, and in times of scarcity obtains by such purchase the right to an equal division of the water with A, whose appropriation is therefore by such transfer cut down from one hundred acres to fifty acres. Such transfers are not inconsistent with economy in the use of water, or with the highest development and improvement of our arid lands. It often happens that land, after many years of cultivation, through the operation of natural laws, by erosion or by floods, leaving deposits of coarse gravel and bowlders, and in some instances by the effects of irri-

gation of soils having an excess of alkali, becomes unfit for profitable cultivation. To deny to a prior appropriator the right to change his appropriation to other land better suited to cultivation, when this may be done without depriving another of water to which the latter would be entitled, would not be in the interest of the best and highest use of water and the reclamation and profitable cultivation of our arid lands. In all the other arid states and territories where the prior appropriation to the use of public waters is recognized as a property right, the courts have uniformly recognized the right of an appropriator to change the place of application of water for beneficial use. Counsel for appellants contend that the statutes of this territory are inconsistent with this doctrine, and refer us to paragraph 3215 of the Revised Statutes, which reads: "During years when a scarcity of water shall exist, the owners of fields shall have precedence of the water for irrigation according to the dates of their respective titles or their occupation of the lands either by themselves or their grantors. The oldest titles shall have precedence always." This section of the statute was a part of what is termed the "Howell Code." It was taken from the statute of New Mexico, and was a re-enactment of the old Spanish and Mexican laws governing public "acequias," as they were called. In 1864, when the Howell Code was adopted, the only sections of the territory where irrigation was practiced to any extent were along the San Pedro and Santa Cruz rivers, and in those sections first settled by Spanish-speaking people, where public acequias had been constructed and the old Spanish and Mexican laws enforced. The private ditch, as distinct from the public acequias, appears to have been practically unknown up to this time, except where the owners of large tracts of land may have constructed ditches within their own boundaries for their own use or that of their tenants. Thus, acequias constructed over the public lands, or through the lands of several proprietors, were regarded as public acequias, and the rights of the users of water under them were regulated by the law which had prevailed in Sonora prior to the acquisition of the territory from Mexico. Paragraph 3223 of the Revised Statutes, which also constituted a part of the Howell Code, in recognition of this, provided that "the regulations of acequias which have been worked accord-

ing to the laws and customs of Sonora, and the usages of the people of Arizona, shall remain as they were made and used up to this day, and the provisions of this chapter shall be enforced and observed from the day of its publication." At the time paragraphs 3215 and 3323 were adopted paragraph 3201 was also adopted, which recognized the right of owners and possessors of arable and irrigable lands to construct, as they might elect, public or private ditches, and appropriate for use upon such lands water from any running stream. After 1864 few, if any, public acequias were constructed, and private ditches became the rule, and to these have been applied, so far as applicable, the general rules and principles governing water-rights adopted and enforced generally in the arid states and territories where the common-law doctrine of riparian rights is not recognized. While we do not say that paragraph 3215 cannot be made to apply to private as well as public acequias, we hold that its strict application must necessarily be restricted to the latter. The paragraph declares that the oldest land titles shall have precedence always in the use of water in times of scarcity. To apply this doctrine literally to owners of land under private ditches, without regard to the time of diversion of water and application of same to the irrigation of such lands, would be a radical departure, not only from the accepted doctrine governing water-rights in other arid states and territories, but also from the rules which have been followed by the courts of this territory since its organization. As applied to private ditches, the statute must be construed as a declaration that not mere priority of diversion, but priority of use and appropriation of water upon particular lands, shall govern in determining conflicting rights; and this, as we regard it when considered in connection with paragraph 3201, is the underlying principle in its broad application to all appropriations of water for irrigation, whether by means of public or by means of private ditches. Such a construction, therefore, does not exclude the right of an appropriator to permanently change his water-right from one tract of land to another, or does not deny to a purchaser of such water-right the right to apply such water-right to land owned or possessed by him, subject to the condition that such change in place of use does not injuriously affect others who have previously acquired rights to the use of water from the common source.

If, therefore, water-right holders, under a private ditch, have a property interest in such water-rights, severable from the lands which have been irrigated under them, and these interests are assignable, so that, as between the vendors and vendees, such assignments carry with them all of the privileges of priority enjoyed by the original holders, and if in this case we construe the certificates in the Utah canal as evidencing water-rights or appropriations owned by the holders, the owners of land under the extension of the canal who have purchased such certificates have succeeded to all the rights of the original holders who are the owners of lands in the original twenty-five quarter-sections. The latter parted with so much of their water-rights as were represented by the certificates sold or assigned, and these interests became the property of the purchasers or assignees, and as all the original holders of land under the canal, by contract among themselves, stood upon an equal footing, so far as priority of right is concerned, it could make no difference to those who retained their certificates whether the others continued to irrigate the original lands possessed by them or other lands, or whether they assigned these rights to others, who used them in the irrigation of lands which they either owned or possessed, unless by such change such original holders received a less quantity of water than if no change had been made. No attempt was made to show that the change from what was known as the "Bottom Lands," which comprised the original twenty-five quarter-sections, to the "Mesa Lands," of water-rights evidenced by the assigned certificates, in itself curtailed the amount of water available to these owners of land and water-rights who retained the original holdings. The case was made under the theory that the transfer of these certificates does not carry with it the rights of the original holders to a division of water during times of scarcity upon the *pro-rata* basis, and that under the statutes of this territory a water-right which is once attached to a particular tract of land cannot be severed from such land and transferred to another and retain its priority, and therefore the ruling as to the assignability of water-rights recognized elsewhere cannot apply to this territory. We hold that our statutes, while recognizing the ownership and possession of land as essential to the acquisition and enjoyment of a water-right for purposes of irriga-

tion, and while limiting its use to the particular lands to which it is attached, do not deny the right of alienation, and the transfer of such right from one particular tract of land to another, except under the limitations that the transferee is of the class of persons entitled to make a valid appropriation by virtue of being the owner or possessor of arable and irrigable land, and that such change does not injure another having rights which have accrued at the time of such transfer and change of use.

The court found, and the evidence abundantly sustained the finding, that, beginning with 1883, certain holders of the one hundred and twenty-eight original certificates sold or assigned them to persons who located and settled upon lands under the extension of the canal, and upon what is known as the "Mesa," and that these latter holders of these certificates, up to the time of the commencement of this suit, with the acquiescence of the other holders of certificates, have enjoyed the same use of water, and the same equal division of water in times of scarcity, with those who retained their certificates and their original holdings of land. Does not this long acquiescence in this use and division of the water, and recognition of the rights of these Mesa holders of land and certificates, estop plaintiffs from, at this late date, asserting their priority of right, conceding them to possess this? In the case of *Dalton v. Rentaria*, 2 Ariz. 275, 15 Pac. 37, this court held that one who stands passively by and allows another to open out fields and irrigate them with water for sixteen years, under the belief that he has a vested right to an equal user thereof, is estopped from subsequently denying this right. The facts of this case show that the rights in controversy were held by the parties under a public acequia. Mr. Chief Justice Wright in this case uses the following language: "We entertain the belief, from the evidence in this case, that there was a custom among these people in the distribution of this water; that that custom was certain, definite, uniform, and notorious; that it had in it the elements of equity and a good conscience, of neighborly kindness and good will, and that under it cultivators of the 'old fields,' while claiming the prior right to the use of said water, and the cultivators of the 'new fields' were claiming an equal right to the use thereof, had settled their wrangles and disputes, and had lived together as neighbors

and friends for more than sixteen years, and had ultimately acquiesced in an equitable and equal distribution of said water, giving the first to those fields that needed it the most; and this custom, we think, has acquired sufficient age to give it the force and sanction of law." The present case is even stronger in its facts than the Dalton case, inasmuch as the court found that the holders of certificates under the extension, with the acquiescence of the others, and upon the understanding and belief that they had equal rights with the others, have expended large sums in the improvement and cultivation and betterment of their lands, the erection of buildings, and other improvements thereon, and that this has continued from eight to sixteen years. We think the doctrine of estoppel, as applied in the Dalton case, applies with equal, if not greater, force in the present case, and that this, in itself, is sufficient to support the judgment by the trial court.

Upon the complaint of the intervener, the court found as follows: "And the court further finds that, ever since the construction of said canal as aforesaid, certain Pima and Maricopa Indians who, with their descendants and successors in interest are now wards of the United States, and are under the charge and control of the intervener, Elwood Hadley, as United States Indian agent, have contributed by their labor to the enlargement and maintenance of the said canal and the dam in said Salt River, by means of which the water in said Salt River is diverted into said canal, and that in consideration of such labor and services the said Indians have received, as compensation therefor, one tenth of the water flowing in said Utah canal for distribution to the holders of shares or water-rights in the said Utah Irrigating Canal Company, and which said water has been used by said Indians in the irrigation of lands cultivated by them and irrigable from said canal." Under this finding of fact, the court entered the following judgment: "That there be apportioned and delivered to the interveners, the Pima and Maricopa Indians, by their agent duly appointed by the United States, a sufficient amount of water to irrigate their lands in sections 35 and 36, not to exceed one-tenth part of the water flowing in the Utah irrigating canal for distribution to the holders of shares or water-rights in the said Utah irrigating canal, for the use of said Indians for the irrigation of the lands occupied by them

irrigable from said canal, upon conditions that the said Indians perform one-tenth part of the work and labor and pay one-tenth part of the necessary expense incurred and paid by the said Utah Irrigating Canal Company in the maintenance of the said Utah irrigating canal and the said dam by means of which the water from said Salt River is diverted into said canal." As found by the court, the right of the Indians to water from the Utah canal arose, not from ownership of shares of stock in the canal, but from the fact that they and their predecessors in interest contributed to the building, enlargement, and maintenance of the canal by their labor, and that ever since the construction of the canal they had been accorded such rights. It is shown that the Indians occupy sections 35 and 36 of township 1 north, range 5 east, and that these sections constitute part of the original twenty-five quarter-sections settled upon by the original shareholders in the Utah ditch. The rights of the Indians are thus in the nature of rights by prescription, but whatever may be their origin, they are now as firmly established as though they were shareholders in the canal. The intervener objects to the judgment, upon the ground that the court limited the apportionment of water for the irrigation of these sections by the Indians to an amount not exceeding one-tenth part of the water flowing in the Utah irrigating canal for distribution to the holders of shares or water-rights in the same, and granted this upon the condition that the Indians perform one-tenth part of the work and labor and pay one-tenth part of the necessary expense incurred and paid by the company in the maintenance of its canal. The testimony shows that, although the Indians occupy sections 35 and 36, they have never cultivated during any one year in excess of one section. It was also shown that the lateral ditch from which the Indians take their water from the Utah canal has a carrying capacity of not to exceed four hundred inches, one witness stating it to be from three hundred to four hundred inches. Under the contract and agreement between the Utah Irrigating Canal Company and the Alamo Irrigating Company, the former is entitled, during times of scarcity, to three thousand miners' inches before the latter company has any right to the use of water. As we have found, the practice since the construction of the canal has been to prorate this amount among the share-

holders and landholders under the Utah canal, and hence the trial court evidently, in fixing the maximum amount of water which the Indians might take from the canal at three hundred inches, had in mind this total of three thousand inches, and the carrying capacity of the Indians' ditch, and the amount of land cultivated for any one season by them. At any rate, if the carrying capacity of the Indians' lateral be three hundred inches, and the amount of water which the Utah canal has the exclusive right to use be three thousand miners' inches, the apportionment of one-tenth of this amount to the Indians is in keeping with the evidence. The Indians certainly cannot claim, when we consider the nature and origin of their rights, more water than they have heretofore used and enjoyed, and it is not shown by the evidence that that would exceed one tenth of the amount diverted and used by the shareholders in the Utah canal. The requirement that the Indians shall perform labor in proportion to the amount of water they are permitted to use, under the decree, and pay one tenth of the expense incurred in the maintenance of the canal, is conformable to the terms and conditions hitherto imposed by the Utah Canal Company upon the Indians, and is not unreasonable, and we see, therefore, no reason why the decree of the court in this regard should be modified or changed. The judgment and decree of the court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 749. Filed March 25, 1901.]

[64 Pac. 414.]

J. M. ALLEN et al., Defendants and Appellants, v. J. W. EVANS, Administrator of Robert Garside, Deceased. Plaintiff and Appellee.

1. JUDGMENTS — COLLATERAL ATTACK — RECORD — PRESUMPTIONS — NONE OF IDENTITY OF PERSONS FROM IDENTITY OF NAMES — VALIDITY — EJECTMENT — BRYAN v. KALES, 3 ARIZ. 423, 31 PAC. 517, FOLLOWED. — Plaintiff brought an ejectment suit to recover possession of certain premises, his title resting in part upon a sale thereof, under a judgment entered in an action by K. against K., adminis-

trator. *Held*, that a judgment in an action is an adjudication that the court had jurisdiction, and on collateral attack it will not be presumed from a mere identity of names that the parties were identical and the judgment invalid.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellants.

Thomas Armstrong, Jr., for Appellee.

DAVIS, J.—On the sixth day of July, 1894, George W. Hoadley, as administrator of the estate of Robert Garside, deceased, brought suit in the district court of Maricopa County against J. M. Allen and W. B. Casey to recover the possession of certain real estate situate in said county, and for the value of the rents and profits thereof. The complaint was in the usual form in ejectment cases. The answer of the defendants was a general denial of the allegations of the complaint. Hoadley subsequently resigned as administrator of the Garside estate, and was succeeded in the trust by J. W. Evans. The latter was substituted as party plaintiff, and the action thereafter proceeded in his name. Upon the trial in the court below the plaintiff obtained judgment for the recovery of the possession of the disputed premises, and also for the sum of \$1,680, as the value of the rents and profits for the period during which possession was unlawfully withheld by the defendants. From this judgment of the district court the defendants prosecuted an appeal.

It appears from the record that the real estate in controversy is the southeast quarter of section 33, township 2 north, range 3 east, Gila and Salt River Meridian, and that on January 28, 1881, the legal title thereto became vested in Jonathan M. Bryan, the common source from which both the appellee and the appellant Allen claim title. It further appears that on August 28, 1883, Bryan died intestate, seized of these premises, encumbered by a mortgage of twelve hundred dollars, which he had executed in his lifetime to one M. W. Kales. In his estate were also several other parcels of realty,

upon which were encumbrances of a similar nature in favor of the said-named mortgagee. After the death of Bryan, M. W. Kales was appointed administrator of the estate, and the record shows that on September 28, 1883, M. W. Kales commenced an action in the district court of Maricopa County against M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, for the foreclosure of four certain mortgages upon different tracts of the decedent's realty, including the mortgage upon the premises here in question. Summons was duly issued and served upon M. W. Kales, administrator as aforesaid, and on October 6, 1883, the said defendant filed an answer to the suit, in which he admitted each and every allegation of the complaint, and consented that judgment be entered in accordance with the prayer thereof. A decree was entered in said cause on October 16, 1883, and in pursuance thereof the several parcels of real estate were sold to satisfy the mortgage liens thereon. The tract involved herein was sold, at public sale, to the appellee's intestate, Robert Garside, for the sum of fifteen hundred dollars. In due course he received a sheriff's deed for the premises, entered upon and continued in the possession thereof until May 26, 1887, when he sold and conveyed the same to one J. De Barth Shorb, taking back a mortgage to secure an unpaid portion of the purchase money. Through the foreclosure of this latter mortgage, the Garside title returned to the estate now represented by the appellee. The appellants based their claim to said premises upon a consecutive chain of transfer to the said J. M. Allen, commencing with a quitclaim deed executed on June 29, 1887, for the expressed consideration of one dollar, by Vina Bryan, the widow and sole heir of Jonathan M. Bryan, deceased, and upon possession taken by the said W. B. Casey, on or about March 27, 1894, as the lessee of Allen.

Several propositions of error are assigned which have relation to rulings made by the trial court in favor of the admissibility of the documentary evidence offered in support of the appellee's title, and to certain findings which are predicated thereon. It is contended by the appellants that the judgment in the district court case of Kales against Kales, administrator, is void upon its face, and that neither the judgment-roll nor the subsequent muniments dependent thereon can constitute any evidence of title in the appellee, and it is in

support of this contention that the entire argument of their counsel is directed. The case, therefore, as we view it, depends wholly upon the effect of that judgment in this collateral proceeding, and, thus narrowed, we consider that the question sought to be raised has previously been adjudicated and settled by this court in *Bryan v. Kales*, 3 Ariz. 423, 31 Pac. 517, where it was similarly involved. In support of the holding in that case, Mr. Justice Sloan, delivering the opinion of the court, said: "I am of the opinion that if upon the face of the record in the suit of Kales against Kales, administrator, it appeared that M. W. Kales, plaintiff, was the same person as M. W. Kales, administrator, the judgment entered in said cause must be treated as utterly void, and no evidence of title in the purchaser under the foreclosure sale of the mortgaged premises made under it. That adversary parties are essential in every cause is fundamental almost. One may not sue himself any more than he may contract with himself. Neither may one sue himself in a representative capacity; for, after all, there is but one person before the court as plaintiff and defendant, and no refinement of reason can, without violence to common sense and manifest absurdity, make it appear otherwise. The authorities, so far as I have investigated, are unanimous that no suit can be maintained by an individual against himself as an administrator of an estate. It is not the case of a trustee dealing with himself, which is sometimes permitted, but the altogether different question of a want of jurisdiction in the court to render a judgment without adversary parties before it. . . . It is settled doctrine that a domestic judgment of a court of record, unless directly impeached, imports absolute verity as to every jurisdictional fact of which the record speaks, and is clothed in the conclusive presumption that every jurisdictional fact exists of which the record may be silent. It is essential, therefore, to determine whether the record in the foreclosure suit of Kales against Kales, administrator, disclosed the fact that M. W. Kales, the mortgagee and plaintiff, was the same person as M. W. Kales, administrator and defendant, in said suit. It is strongly urged by the counsel for the appellant that this fact does appear upon the face of the record of that cause, inasmuch as it should be presumed alone from the similarity of names, applying the rule of evidence that identity of names

is *prima facie* evidence of identity of persons. An examination of authorities will show that this rule of evidence is not one of universal application; that it grew out of the general presumption in favor of the validity of contracts, the regularity of land titles, and the integrity of records; that wherever its effect would be to negative these general presumptions, the reason of the rule ceasing to exist, the rule itself becomes inoperative; that hence it can have no application to a case like the one at bar, if, indeed, it applies at all to a judgment of a court of record, where the result of its application would be to impeach and destroy its effect as a valid and binding estoppel of record. . . . Aside from the consideration of the cases, there does not seem to be any sufficient reason why it should be presumed, from the mere similarity of names, that the court would entertain jurisdiction and enter its judgment in a case where both the plaintiff and defendant are one and the same person, when, as a matter of fact, they may have been different persons. I am therefore of the opinion that the judgment in the case of Kales against Kales, administrator, was not open to attack in this action; it being upon its face regularly entered in a cause of which the court had jurisdiction of the subject-matter, and presumptively of the parties to the action." To what was said in *Bryan v. Kales*, *supra*, all of which is equally applicable to the case at bar, it might be added that the judgment itself was an adjudication that the court had jurisdiction, and on collateral attack was conclusive, except as to infirmities shown in the judgment-roll. To permit its validity to be impeached in a collateral action by facts *aliunde* the record would, it seems to us, be to overturn the foundation of judicial proceedings. Attributing, then, for the purposes of this case, absolute verity to the judgment in Kales against Kales, administrator, the evidence of the title derived through it is sufficient to sustain the essential findings upon which the judgment in this case rests. The judgment appealed from is therefore affirmed.

Sloan, J., and Doan, J., concur.

Street, C. J., having been of counsel, took no part in this decision.

[Civil No. 750. Filed March 23, 1901.]

[64 Pac. 412.]

J. M. ALLEN, and D. C. MURRAY, Treasurer and Ex Officio Tax-Collector of the County of Maricopa, Defendants and Appellants, v. J. W. EVANS, Administrator of the Estate of Robert Garside, Deceased, Plaintiff and Appellee.

1. TAXES AND TAXATION—SALE FOR DELINQUENT TAXES—TITLE CANNOT BE STRENGTHENED BY PURCHASE AT TAX SALE, IF PURCHASER IS BOUND TO PAY TAXES.—One who is under any legal or moral obligation to pay taxes cannot, by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale.
2. SAME—SAME—ONE IN POSSESSION, IF NOT BOUND TO PAY TAXES, MAY PURCHASE.—One who is under no legal or moral obligation to pay taxes is not precluded from purchasing at the tax sale, although in possession at the time the assessment was made or when the land was sold.
3. SAME—SAME—ACTION TO ENJOIN—INJUNCTION—WILL ONLY BE GRANTED WHERE PLAINTIFF SHOWS CLEAR AND UNEXCEPTIONABLE RIGHT.—Plaintiff alleged that he purchased property at foreclosure sale on March 26, 1894; that possession had never been obtained by him; that on the same day defendant entered into possession claiming title under two deeds of prior date duly recorded and had continuously remained in possession, receiving the rents, issues, and profits therefrom; that while so in possession, and claiming ownership, the defendant suffered the taxes to become delinquent and the premises to be sold therefor; that at the sale the defendant became the purchaser; that these acts were done to cast a cloud upon plaintiff's title and to defraud plaintiff of the premises by obtaining a deed therefor, and prayed for a perpetual injunction restraining the treasurer from signing a deed to defendant, and defendant from receiving any deed based upon said tax sale. *Held*, that the complaint fails to state facts sufficient to entitle the plaintiff to relief by injunction, it appearing therein that the title to the premises is in dispute.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa, R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Baker & Bennett, for Appellants.

Thomas Armstrong, Jr., for Appellee.

DAVIS, J.—On the eighteenth day of July, 1896, the appellee commenced an action in the court below to enjoin the defendant D. L. Murray, as treasurer and *ex officio* tax-collector, from issuing, and the defendant J. M. Allen from receiving, a tax-deed for certain real estate situate in Maricopa County, which had theretofore been declared sold to Allen for the delinquent taxes of the year 1894, and for which he was holding a certificate of sale. The complaint sets forth in substance that the plaintiff is the owner and entitled to the possession of said real estate; that he derives title thereto through a purchase at foreclosure sale on March 26, 1894; that possession has never been obtained by him; that on said March 26, 1894, the defendant Allen entered into possession of said premises, claiming title under two certain deeds of conveyance, duly recorded, one dated March 1, 1894, and the other March 8, 1894, and has ever since continuously occupied the same, receiving the rents, issues, and profits thereof, and excluding the plaintiff therefrom; that, while so in the occupancy of said premises and claiming ownership, the said defendant neglected and refused to pay the taxes thereon for the year 1894, suffered the same to become delinquent, and the premises to be sold therefor on July 11, 1895; that said defendant became the purchaser at said sale for the sum of \$306.76, and received a certificate in the usual form; that these acts were done for the purpose of casting a cloud upon plaintiff's title and to defraud him of said premises by obtaining a deed therefor on account of said delinquent tax sale; that by the terms of said certificate the said Allen will be entitled to such a deed at the expiration of one year from said sale, and that he threatens and intends to apply therefor on the twentieth day of July, 1896; that the said defendant Murray, as treasurer and *ex officio* tax-collector as aforesaid, will, unless restrained by the order of the court, issue such tax-deed to said Allen, to plaintiff's great injury and damage. There is a prayer for an injunction forever prohibiting the treasurer and *ex officio* tax-collector from issuing and the said Allen from receiving any deed based upon the said certificate of sale, and it is also prayed that the said certificate be ordered surrendered and canceled. A general demurrer was inter-

posed to the complaint, and the answer also contains other defenses. The demurrer was overruled, the cause proceeded to trial, and on the final hearing the court granted to the plaintiff the injunction and relief as prayed for. The defendants' motion for a new trial being denied, they bring this appeal.

Did the district court err in overruling the demurrer? Ordinarily, a suitor in equity, asking to be relieved from an alleged illegal sale of his lands for delinquent taxes, is required to show by the averments of his complaint that he has either paid or tendered the amount of the taxes or charges which were legal. In the case at bar the appellee excuses himself from compliance with this usually just rule of equity upon the theory that the appellant Allen, having been in possession of the real estate under a claim of ownership when the tax was levied and sale made, was in duty bound to have paid the taxes thereon, and that a tax sale to him, under these circumstances, only amounted to a payment of the taxes. As a proposition of law the theory stated by the appellee is not without authority for its support. *Barrett v. Amerein*, 36 Cal. 322; *Bernal v. Lynch*, 36 Cal. 135; *McMinn v. Whelan*, 27 Cal. 300; *Whitney v. Gunderson*, 31 Wis. 359; *Douglas v. Dangerfield*, 10 Ohio, 152; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460. The principle has been enunciated that one who is under any legal or moral obligation to pay taxes cannot by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale; and, on the other hand, one who is under no legal or moral obligation to pay taxes is not precluded from purchasing at the tax sale, although in possession at the time the assessment was made or when the land was sold. *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94, and note. Blackwell on Tax Titles (3d ed., at p. 397), states the principle in this language: "One in possession of a tract of land at the date of the assessment may purchase at the sale, unless it appears that he was bound to pay the taxes, in which event he can acquire no title by his purchase." It is not claimed in this case, so far as the complaint shows, that there were any contractual or other relations existing between the appellee and the appellant Allen which would preclude the latter from buying the former's land for delinquent taxes,

but, on the contrary, the complaint does show that the claims of the parties have always been openly adverse. Allen went in as a stranger to the appellee's title under a claim which denied its existence. If, therefore, he was precluded, it must be on the ground that it was his duty to the county and territory to pay the taxes, and that he is not to be permitted to build up a title on this neglect of duty. Judge Cooley, in his admirable work on Taxation, discusses this subject in the following manner: "Whether one should be precluded by the naked fact that he claims title to land, or that he has possession of it, from making a purchase in extinguishment of the right of another, with whom he stands in no contract or fiduciary relations, is a question often touched by the discussions of courts without having as yet been very fully or comprehensively examined. So far as the cases hold that one who ought, as between himself and some third person, to pay the taxes, shall not build up a title on his own default, the principle is clear and well founded in equity. But when one owes no duty to any other in respect to the land, it is not so clear upon what principle of equity or of estoppel such other is to set up, as against him, his neglect to perform in due season his duty to the state. There are some cases in which it has been distinctly held that possession, when the tax was assessed, fixed upon the possessor the duty to pay, and precluded his becoming a purchaser at a sale for the taxes when they became delinquent. In the leading case the occupant had gone into possession under an invalid tax title, and by the decision he was precluded from relying upon a second title which accrued while he was in the occupancy of the land. The subject is dismissed with very brief mention, the court appearing to regard the claim as inequitable and unjust, but for what reason is not very clearly explained. Other cases treat the point as equally plain. But it seems to be very well deserving of more consideration whether, where parties stand to each other in the position of adverse claimants to land, either of them can insist that the other shall discharge for his protection a duty owing to the public. There being nothing in the relation of the parties to each other upon which an estoppel can be raised, it is necessary to look elsewhere for the disqualification insisted upon, and this can only be found in some general rule of public policy. It is certainly an imperative requirement

of public policy that the revenues of the state shall be collected, and that no one shall be allowed to defraud the treasury of his due proportion; but in the case where a tax sale has been made there is no fraud, and the revenue chargeable upon the land has been received. No wrong has consequently been done to the state. There has been delay in payment, but it is one for which the state makes ample provision, and for which it charges and collects all costs, as well as a further sum, under the name of 'interest' or 'penalty,' sufficient fully to compensate for any public inconvenience. It is not perceived that the state can then have any complaint to make, as the duty owing to it, though performed tardily, has been performed at last, and the incidental inconvenience paid for. The state, then, not being wronged in the purchase, it would seem that, if any individual objects to it, he ought to be able to point out how and in what particular it wrongs him. It is difficult to dispute the truth of what is said by the supreme court of Pennsylvania, that 'there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes.' As between himself and any adverse claimant, the state is not concerned to inquire whether the one or the other was in possession. If the state, in taxing land, takes any notice of ownership, it is either for the convenience of the officers in making collections or for information to parties concerned. The tax is upon every possible interest in the land, and all parties having interests are equally under obligation to the state to make payment. The penalty for failure is a forfeiture or sale which will cut them all off, and while, without doubt, any one may defeat such a sale who can give satisfactory reasons for an assertion that it would be unjust to him for the purchaser to be allowed to rely upon it, it is not perceived that any other person can, upon plausible grounds of equity, insist upon the privilege to do so." Cooley on Taxation, 2d ed., p. 506.

But whatever might be held to be the effect of this tax sale in an action at law, we do not think the appellee's complaint shows facts sufficient to entitle him to be relieved against it in this action. It appears from his own pleading that between himself and the appellant Allen there exists adverse claims of title, the merits of which are not put in issue, and cannot be determined in this proceeding. He apprises the court, how-

ever, that he has never been in possession of the disputed premises, but that Allen has been in the continuous occupancy thereof. In this state of his pleading he presents no equitable cause for the interference of the court in his behalf. For a perpetual injunction the plaintiff must show a clear and unexceptionable right. The judgment of the district court is reversed and the cause remanded, with instructions to sustain the demurrer to the complaint.

Doan, J., concurs.

Sloan, J.—I am unable to concur in the opinion of the court in this case.

Street, C. J., having been of counsel, took no part in this decision.

[Civil No. 734. Filed June 1, 1901.]

[65 Pac. 149.]

**COPPER QUEEN CONSOLIDATED MINING COMPANY,
a Corporation, Petitioner and Appellant, v. THE
BOARD OF EQUALIZATION OF COCHISE
COUNTY, Respondent and Appellee.**

1. JURISDICTION—INFERIOR TRIBUNALS—MUST APPEAR ON THE FACE OF PROCEEDINGS—PRESUMPTIONS.—In tribunals of special and limited jurisdiction the particular facts and circumstances upon which their jurisdiction is based must appear upon the face of the proceedings. No presumptions are indulged in favor of their jurisdiction, and it will be assumed that jurisdiction was wanting where the record does not show affirmatively that it has been acquired.
2. TAXES AND TAXATION—BOARD OF EQUALIZATION—JURISDICTION—LIMITED—RECORD—MUST SHOW AFFIRMATIVELY ALL FACTS NECESSARY TO GIVE JURISDICTION—PRESUMPTIONS.—The board of equalization, in acting upon the assessment-roll, is a body possessed of but limited and special powers. When its power and authority to do a particular thing are questioned, the record must exhibit affirmatively all the facts necessary to give it the authority to do the act complained of; otherwise, the presumption is against its jurisdiction.
3. SAME—SAME—SAME—ORIGINAL—APPELLATE—RECORD—FAILURE TO SHOW FACTS GIVING JURISDICTION—INCREASE OF ASSESSMENT—CONDITIONS PRECEDENT—REV. STATS. ARIZ. 1887, PAR. 2654, CON-

STRUED.—The statute, *supra*, defines and limits the power and authority of the board of equalization, and provides that its original jurisdiction to add to the valuation of property must be exercised at the July sitting, and that action on a day named after a reasonable notice to the persons interested, is essential as a condition precedent to confer that jurisdiction. It further provides that its jurisdiction at the August sitting is purely appellate, and is dependent upon the appearance before them of the person to the assessed value of whose property there was an amount added in July, and the affidavit of such person that he had no knowledge of such increased valuation. The record of the board showed that the original action of the board in adding to the assessed valuation was taken on the twelfth day of July, on which day appellant's superintendent was notified to be present on the nineteenth day of July, when the board would act in the matter; that said superintendent did not appear; that no action of the board was then taken, nor was there further action thereon until August 1st. The record is conflicting as to whether the addition was made on July 12th or August 1st. *Held*, that an examination of the record as furnished in the return failed to show the jurisdictional facts which would render legal or binding the action of the board in raising the assessment either on the twelfth day of July or the first day of August.

4. CERTIORARI—SUPERSEDEAS—SUBSEQUENT ACTION VOID.—Inasmuch as a writ of *certiorari* takes effect as a *supersedeas* upon its being delivered to the officer or board to whom it is directed, rendering all subsequent proceedings before him or it *coram non judice* and void, any attempted action of a board of equalization to increase an assessment sought to be reviewed after a writ of *certiorari* was issued to said board, commanding it to desist from further proceedings in relation to increase of such assessment, was void.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Reversed.

The facts are stated in the opinion.

Herring & Mitchell, for Appellant.

Whatever may be the particular language of the given statute creating tribunals with the powers of our boards of equalization, the cases clearly establish the following general principles: 1. That in the exercise of the powers conferred upon them, such tribunals, as in the case of all special tribunals created by statute, must follow strictly the method and procedure pointed out in the statute; 2. That the party to be affected by their acts is entitled to notice and a hearing,—in

other words, to a day in court,—otherwise the proceedings will be irregular and void; 3. That the proceedings of the tribunal are judicial in their nature, and should be based, therefore, upon investigation into the matter to be acted upon and upon evidence. *Alleghany County Commrs. etc. v. New York Mining Co.*, (Md. App.) 25 Atl. 864; *Dykes v. Lockwood Mortg. Co.*, 57 Kan. 416, 46 Pac. 711; *Hoeftling v. City of San Antonio*, 15 Tex. Civ. App. 257, 38 S. W. 1127; *Eaton v. Union County Nat. Bank*, 141 Ind. 159, 40 N. E. 693; *Slaughter v. City of Louisville*, 89 Ky. 112, 8 S. W. 917; *Alabama etc. Ry. Co. v. Brennan*, 69 Miss. 103, 10 South, 451.

James Reilly, and Ben Morgan, for Appellee.

DOAN, J.—On the twenty-seventh day of July, 1899, the Copper Queen Consolidated Mining Company filed in the district court of the first judicial district in and for the county of Cochise an application for a writ of *certiorari* to review the action of the board of equalization of Cochise County in the matter of the assessment of the property of the said company, alleged to have been had on the twelfth day of July, 1899. The writ was issued on July 27, 1899, and was worded in part as follows:

“To the Board of Equalization, Cochise County, Arizona: You are hereby commanded to certify fully to the district court of the first judicial district, . . . and annex to this writ a transcript of the record and proceedings of said board, . . . and also a full, true, and correct transcript of the minutes of the board of equalization in the matter of the assessment of the property of the Copper Queen Consolidated Mining Company, . . . and also a transcript of any other action or proceeding of said board on or before July 12, 1899, in relation to the assessment of the property of said corporation, that the same may be reviewed by this court; and in the mean time you are required and commanded to desist from further proceedings in the matter to be reviewed in relation to the increased assessment made by you on the twelfth day of July, 1899, to wit: Bisbee, Copper Queen Consolidated Mining and Smelter Company were raised as follows on their assessment. Doctor’s office, etc. (list as contained in return). And until the hearing and determination of said matters and proceed-

ings all further action and proceedings by you in relation thereto are hereby stayed. . . . ”

The board filed a sworn return to the writ on the twenty-fourth day of November, 1899, of which the following is a partial copy:

“Territory of Arizona, County of Cochise—ss.: Office of the Board of Equalization. I, Frank Hare, clerk of the board of equalization of Cochise county, do hereby certify and return to the writ of certiorari hereto annexed:

“1st. That the list of the property of the Copper Queen Consolidated Mining Company returned by the county assessor before July 1, 1899, was as follows, to wit:—

“Total valuation of real estate as per schedule A attached:

Value of land	\$ 6,505
Value of improvements	42,050

Total value.....	\$48,555
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Description of personal property:

Library	300
Pianos and organs.....	100
Merchandise of any and all kinds.....	54,800
Safe and office furniture.....	1,500
Work horses, No. 10	200
Wagons and buggies and other vehicles.....	475
Harness, saddles, and bridles.....	100
Lumber and lagging.....	7,880
Hoisting works, pumping and other machinery at mines.....	24,000
Smelting works and appurtenances.....	85,000
Mill, mine, and smelter supplies of any and all kinds, including coke and coal.....	9,750
Surveyors' instruments	50
Assaying outfit	100
Tools and machinery, including other items and other property not enumerated above, ice machinery.....	1,500

	\$234,310
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Total value of personal property.....	\$185,755
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Total value of real estate.....	48,555
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	\$234,310
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“As sworn to by the agent of the company, Ben Williams.

“2d. That the proceedings of the board of equalization in the said matter were as follows:

“ ‘July 12th, 1899. Board met, pursuant to adjournment

July 11th, at 9 A. M., all members present, and proceeded with its labors as board of equalization. Clerk instructed to notify all persons whose valuation was raised to appear before the board on July 18th, 19th, and 20th. . . . Copper Queen Consolidated Mining & Smelting Company were raised as follows on their assessment:—

	Raise.
Doctor's office and library building from \$7,800 to \$9,800.....	\$ 2,000
Hankin's store, Main street, from \$750 to \$1,000.....	250
Merchandise, from \$54,800 to \$84,800.....	30,000
On ten work horses, from \$200 to \$400.....	200
On lumber and lagging, from \$7,880 to \$10,000.....	2,120
On hoisting works, pumping and other machinery, from \$24,000 to \$39,000.....	15,000
On smelters, from \$85,000 to \$120,000.....	35,000
On mine and smelting supplies and coal, etc., from \$9,750 to \$11,750.....	2,000
On improvements consisting of store building, warehouse, hospital building, and doctor's residence, from \$29,500 to \$39,500	10,000
"Added" on cars and car track in mine.....	12,000

" 'Adjourned to July 18th, at 9 A. M. . . . '

"On the 12th day of July, by order of the board, I deposited in the Tombstone post-office a notice to the Copper Queen Consolidated Mining Company, in a sealed envelope, and directed to Ben Williams, the recorded agent of said Copper Queen Consolidated Mining Company, and superintendent, a notice, of which the following is a true copy:

" 'Office of the Board of Equalization, Cochise County, Tombstone, Arizona. Ben Williams, Superintendent, Bisbee: Referring to the inclosed list, you will ascertain the amount the county board of equalization proposes to add to your assessment. Should you wish to show cause why said amount should not be added, the board will hear you on July 19th, 1899. FRANK HARE, Clerk, by JAMES F. DUNCAN, Deputy Clerk. [List same as above.]'

"I further certify that by direction of the board I caused to be published in the Tombstone Prospector, a daily newspaper published in Cochise County, a notice of which the following is a true copy, for a period of eight days:—

" 'NOTICE.

" 'To property owners the assessed value of whose property was increased by the board of equalization at the July, 1899,

sitting. Office of the Board of Supervisors, Tombstone, July 22d, 1899. The following is the list of property the assessed valuation of which was raised by the board of equalization of Cochise County at its regular July, 1899, sitting, together with the names of the owners thereof, which said owners have failed to appear before said board in response to notification to appear and show cause, if any, why the raise should not be made. Published in compliance with paragraph 2654, section 28, of the Revised Statutes of Arizona.

Amount Raised and Added.

Copper Queen Consolidated Mining and Smelting Co.:

On doctor's office and library building.....	\$ 2,000
On Hankin's store	250
On merchandise	30,000
On ten work horses.....	200
On lumber and lagging.....	2,120
On hoisting works and machinery.....	15,000
On smelters	35,000
On mine and smelting supplies.....	2,000
On store buildings and other buildings.....	10,000
On cars and car track.....	12,000

“ ‘Now, notice is hereby given to the parties named in the foregoing list that the board of equalization of the county of Cochise, Arizona Territory, will again sit as a board of equalization on Tuesday, August 1st, 1899, at 10 A. M., at their office in the courthouse in the city of Tombstone, when all persons whose property was added to the value upon the assessment roll of Cochise County for the year 1899 by the board of equalization, and who failed to appear before said board at its July sitting, may appear before said board at its sitting on Tuesday, the 1st day of August, 1899, and, upon making affidavit that they had no knowledge of such increased valuation of their property, they will be heard pursuant to law. R. W. BARR, Chairman. FRANK HARE, Clerk. JAMES F. DUNCAN, Deputy Clerk.’

“ ‘Tombstone, August 1st, 1899. Board of supervisors met as a board of equalization pursuant to adjournment of meeting July 20th, at 10 A. M. Members present: R. W. Barr, Chairman, John Montgomery, and M. C. Benton. . . . Copper Queen Consolidated Mining Company is proposed to be raised as follows:

Doctor's office and library building, from \$7,800 to \$9,800.....	\$ 2,000
Hankin's store, Main street, from \$750 to \$1,000.....	250
Merchandise, from \$54,800 to \$84,800.....	30,000
On ten work horses, from \$200 to \$400.....	200
On lumber and lagging, from \$7,800 to \$10,000.....	2,200
On hoisting works, pumping and other machinery, from \$24,000 to \$39,000.....	15,000
On smelters, from \$85,000 to \$120,000.....	35,000
On mine and smelting supplies and coal, etc, \$9,750 to \$11,750..	2,000
On improvements consisting of store building, warehouse, hospital building, and doctor's residence, from \$29,500 to \$39,500	10,000

“Whereas, on the 12th day of July, 1899, this board proposed to raise the assessment of the Copper Queen Consolidated Mining Company as set out in the minutes of the board on page 40 thereof as corrected; and whereas, the clerk of this board, by his deputy, did on that day post a notice directed to the superintendent and agent of said company, posted by mail, as appears by the oath of said deputy clerk, that this board would act on said case on July 19th, 1899, when the said company might appear to be heard on the matter, and no appearance having been made by said company on that or any day since; and whereas, the list of raises proposed to be made by this board was published by said clerk in the Tombstone Prospector on the 22d day of July, 1899, and continuously to this day, and still no appearance has been made by said company: Now, therefore, it is ordered that the raised valuation of the property of the said company as proposed (excepting the addition of \$12,000 for cars and car track in mine) be, and the same is hereby, finally fixed as proposed to be raised. . . . R. W. BARR, Chairman. FRANK HARE, Clerk. JAMES F. DUNCAN, Deputy Clerk.’ ”

The case was tried before the court upon the record brought up in said return. The court rendered judgment that “the action of the board, as shown by the record of July 12, 1899, whereby the said board assumed authority to enter upon the assessment roll of said county, as the property of the petitioner, at the valuation of \$12,000, certain property, to wit, cars and car track in mine, was taken in excess of the jurisdiction of the said board, and the same is hereby annulled, and declared to be without legal effect; and that in all other respects the proceedings had by said board be, and the same are

hereby, affirmed." From this judgment and the order denying a new trial the petitioner appeals.

It is assigned as error by the appellant that "the court erred in giving judgment affirming the proceedings had by the board of equalization in July and August, 1899, by which the board undertook to add to the valuation of petitioner's property on the assessment roll of that year, and in not giving judgment annulling said proceedings, for the reason that it appeared by the return of the board to the writ of *certiorari*, and was an uncontroverted fact in the record before the court, that the only action taken by the board in the matter was had and taken on July 12th, without any previous notice to petitioner, and on August 1st, without any appearance before them by the petitioner; and hence the whole proceeding was irregular and void, and beyond the jurisdiction of the board." It is necessary to determine whether the record of the proceedings of the board of equalization, as embodied in their return, shows the necessary jurisdictional facts to sustain their authority for the action taken by them. It is an admitted proposition that in tribunals of special and limited jurisdiction the particular facts and circumstances upon which their jurisdiction is based must appear upon the face of the proceedings. No presumptions are indulged in favor of the jurisdiction of an inferior tribunal, and it will be assumed that jurisdiction was wanting where the record does not show affirmatively that it had been acquired. *Starr v. Village of Rochester*, 6 Wend. 564; *Kinderhook v. Claw*, 15 Johns. 537; *Commonwealth v. Chase*, 2 Mass. 170. The board of equalization, when acting upon the assessment roll, is a body possessed of but limited and special powers. When, therefore, its power and authority to do a particular thing are questioned, the record must exhibit affirmatively all the facts necessary to give it the authority to do the act complained of. When this is not done, the presumption is against its jurisdiction. *State v. Ormsby County*, 6 Nev. 95; *State v. Board of Commissioners of Washoe County*, 5 Nev. 317. By the provisions of the Revised Statutes of this territory for the assessment of taxes, after the assessor has completed the assessment-roll the board of equalization may change and correct any valuation of property either by adding thereto or deducting therefrom, whether such valuation was fixed by the owner or the assessor. They

act, however, under the special authority of the statute, and whatever they may do by way of making additions to the valuation of property as fixed in the assessment-roll by either the owner or the assessor must be done strictly in accordance with the authority given them. Their acts in this matter, when within the scope of their authority, and in strict compliance with the necessary conditions precedent as described in the statute, such as the giving of the required notice and the like, are final and binding, and are not subject to review by any other tribunal for the correction of mere informalities, or subject to reversal by any higher court by reason of any errors in judgment or procedure which do not involve the question of transcending their authority. If, however, they proceed without the warrant of law, disregarding those matters prescribed as conditions precedent, their proceedings will be reviewed by the higher court, and, when found to be in excess of authority, or without jurisdiction, will be annulled. *Commissioners of Allegheny County v. New York Min. Co.*, 76 Md. 549, 25 Atl. 864. Paragraph 2654 of the Revised Statutes clearly defines and limits the power and authority of the board in the following language: "The board of equalization shall meet on the first day of July, . . . and shall continue in session from time to time until the business of equalization presented to them is disposed of; provided, however, that they shall not sit after the twentieth day of July, except as in this section provided. The board of equalization shall have power to determine whether the assessed value of any property is too small or too great and may change and correct any valuation either by adding thereto or deducting therefrom, if the sum fixed in the assessment-roll be too small or too great, whether said sum was fixed by the owner or the assessor, and if the board of equalization shall find it necessary to add to the assessed valuation of any property on the assessment-roll they shall direct their clerk to give notice to the persons interested by a letter deposited in the post-office or express or otherwise, naming the day when they shall act in that case, and allowing a reasonable time to appear, and the said board of equalization on the hearing are hereby empowered to issue compulsory process and require the attendance of any person or persons whom they may suspect to have a knowledge of the value or amount of such taxable property, and examine such person or

persons under oath in relation thereto. As soon as possible after the adjournment of the board of equalization in July its clerk shall make out a list of all persons the valuation of whose property has been added to, with the amount so added, on the assessment-roll, who have not appeared before the board, and the board of supervisors shall cause the same to be published in one newspaper in the county, . . . and any person to the assessed value of whose property there was an amount added not appearing before the board in July may appear before the board in August, and upon making affidavit that he had no knowledge of such increased valuation of his property he shall have a hearing before the board of equalization; and the determination then had shall be final." An examination of this statute shows that the original jurisdiction of the board to add to the valuation of property must be exercised at their July sitting, and that action on a day named, after a reasonable notice thereof to the persons interested, is essential as a condition precedent to confer that jurisdiction. Their jurisdiction in August is purely appellate, and is dependent upon the appearance before them of the person to the assessed value of whose property there was an amount added in July, and the affidavit of such person that he had no knowledge of such increased valuation.

From the return it appears that the original action of the board in adding to the assessed valuation of the property in question was taken on the twelfth day of July; that on that day the superintendent of the company was notified to be present on the nineteenth day of July, which date was named as the day when the board would act in that case; that the superintendent thus notified was not present on that day, or any day thereafter; and the record in the case, as returned by the board, does not furnish any evidence of any action of the board in reference to the property after the twelfth day of July until the first day of August. The minutes of the board, as embodied in their return, are conflicting, the different recitals of the transactions of the board on certain dates being inconsistent with each other. The minutes of the board of the twelfth day of July, as embodied in their return, show that the valuation was added to on the twelfth day of July, 1899, and that notice of such action was that day mailed to the superintendent of the company. The notice published on the

twenty-second day of July likewise states that the valuation was raised at the July sitting. The minutes of the first day of August ignore any action of the board other than the proposal to raise the valuation before that date, and recite that: "The notice having been given on the twelfth day of July that the board would act on said case on July 19, 1899, and no appearance having been made by said company on that day, or any day since," that on the first day of August "it is therefore ordered that the raised valuation of the property of the company as proposed on the twelfth day of July be, and the same is hereby, finally fixed as proposed to be raised." While it is impossible to determine from the conflicting statements contained in the return whether the valuation of the property was increased on July 12th or on August 1st, it is clearly established that it was on one or the other of those two dates. No record is furnished of any action in the premises by the board on any other date. An examination of the record as furnished in the return fails to show the jurisdictional facts that would render legal or binding the action of the board in raising the assessment either on the twelfth day of July or the first day of August. In order to give the board jurisdiction to increase the valuation of the property, it was necessary that the act should be performed by the board on a day named, after reasonable notice to the owner. Any action had on the twelfth day of July, other than to name the day when the board would act in that case and give the notice, was without jurisdiction. If the raise was, therefore, definitely made on that date, the district court should have annulled the action of the board, and set it aside. In order to give the board jurisdiction to raise the valuation of the property on August 1st, it would have been necessary for the board to have taken definite action in July on a day named, after reasonable notice to the owner, and it would have then been necessary for the owner or its agent to appear before the board on the first day of August, and make affidavit that he (or it) had no knowledge of the action of the board in July raising the valuation. Unless based upon these conditions precedent, any action of the board on the first day of August raising the valuation was without jurisdiction, and the district court should have annulled such action and set it aside for that reason. There is, moreover, a further objection

to the validity of any action of the board in raising the assessment on the first day of August. The writ of *certiorari* takes effect as a *supersedeas* upon its being delivered to the officer (or board) to whom it is directed, rendering all subsequent proceedings before him (or it) *coram non judice* and void. *Case v. Shepherd*, 2 Johns. Cas. 27; *Patchin v. Mayor*, 13 Wend. 664. The writ in this instance was served upon the members of the board on the twenty-eighth day of July, 1899, and commanded them to desist from further proceedings in the matter to be reviewed in relation to the increased assessment made on the twelfth day of July, 1899, referring to the list, and, until the hearing and determination of said matters and proceedings, all further action and proceedings by the board in relation thereto were in specific terms declared to be stayed. This rendered void and without any legal effect any attempted action of the board in the premises after the twenty-eighth day of July, 1899. If the board had raised the assessment on the nineteenth day of July, the date named in the notice served on the company's agent, or any day thereafter to which an adjournment was had, prior to the twentieth day of July, a different question would be presented. There is, however, no evidence in the return, and no claim made by the board, that the valuation of the property was raised on a day named in July, after reasonable notice to the owner. The action of the board increasing the valuation of the property was, therefore, without jurisdiction, and the judgment of the district court affirming the proceedings therein is reversed, and it is hereby ordered, adjudged, and decreed that the proceedings of the board of equalization of Cochise County, territory of Arizona, as shown by the records of the twelfth day of July, 1899, and the first day of August, 1899, in the matter of adding to the valuation of the property of the Copper Queen Consolidated Mining Company, were without jurisdiction, and the same are hereby annulled and set aside.

Street, C. J., and Sloan, J., concur.

[Civil No. 737. Filed June 1, 1901.]

[65 Pac. 332.]

HENRY E. SLOSSER, Plaintiff and Appellant, v. SALT RIVER VALLEY CANAL COMPANY, a Corporation, Defendant and Appellee.

1. WATER AND WATER-RIGHTS — APPROPRIATION — STATUTES — CONSTRUCTION — FOREIGN DECISIONS. — The legislation of the territory of Arizona differs fundamentally upon the subject of appropriations of water for beneficial uses from the legislation of other states and territories, with the single exception of the territory of New Mexico, and, therefore, the decisions of other states are not controlling in the decision of questions which arise under local laws.
2. SAME — SAME — CORPORATION — RIGHT TO APPROPRIATE — COMP. LAWS ARIZ. 1871, CHAP. 55, SECS. 3, 7, (REV. STATS. ARIZ. 1901, PARS. 4176, 4180,) CONSTRUED. — A corporation is included among persons authorized to construct acequias and make an appropriation of water for agricultural purposes.
3. SAME — SAME — BASIS OF RIGHT — COMP. LAWS ARIZ. 1871, CHAP. 55, SECS. 1, 3, 7, (REV. STATS. ARIZ. 1901, PARS. 4174, 4176, 4180,) CONSTRUED. — Under the statutes, *supra*, the ownership and possession of arable and irrigable land is essential for the acquisition of the right of appropriation of water from a public stream for purposes of irrigation.
4. SAME — CORPORATIONS — APPROPRIATION. — A corporation organized for the purpose of diverting and delivering water from a public stream to water-users and not itself the owner or possessor of arable or irrigable land is not an appropriator of water.
5. SAME — APPROPRIATION — DEFINITION. — The definition of an appropriation involves the idea of the use or application of water from a public stream for a beneficial purpose, under conditions prescribed by statute, or by custom having the effect of law, so as to vest a permanent right to such use and application, and necessarily involves an equally fixed or permanent ownership or control of the means by which the use and application may be enjoyed.
6. SAME — SAME — DIVERSION — OWNERSHIP. — Means of diversion may be owned in common by a number of appropriators, or such means may be owned by one person and the appropriation by another, provided the latter has a fixed or permanent right, by contract or otherwise, entitling him to the service of such means for the purpose of his appropriation.
7. SAME — SAME — HOW PERFECTED. — An appropriator may immediately, by constructing and owning his own ditch or canal, or, mediately,

by acquiring the permanent right to the service of another's ditch or canal, whether the latter be owned by a natural or artificial person, perfect his appropriation.

8. SAME—SAME—DIVERSION—BY CORPORATION—AGENCY.—A corporation organized for the purpose of furnishing water for agricultural purposes, to be used by others in privity of contract with it, becomes the mere agent of the latter, and may divert from a public stream water which the latter may acquire and use for purposes of irrigation, and the measure of its right to divert is the needs and requirements of those owners or possessors of arable and irrigable lands with whom, by contract, it stands in relation as agent.
9. SAME—PUBLIC PROPERTY.—Water, being public property in a running stream, continues to be public property even when diverted for beneficial uses, and remains such until actually applied to such uses.
10. SAME—APPROPRIATION—CONTROL OF.—Whenever an appropriator of water ceases to use for a beneficial purpose any water which has its source in a public stream, his power or authority to control the same ceases.
11. SAME—CANAL COMPANIES—SHARES.—Where a corporation and its shareholders have regarded each share as carrying with it a water-right in the canal, as between the corporation and its members and between the shareholders themselves, the ownership of such shares of stock may establish all the rights to the use of water which would follow were the owners of such shares tenants in common in the canal, provided each stockholder claiming said right has made an actual application of it to a beneficial use.
12. SAME—WATER-RIGHTS—MUST BE ATTACHED TO LAND.—A water-right, to be effective, must be attached to land, and become, in a sense, appurtenant thereto.
13. SAME—CANAL COMPANIES—SHARES—SERVICE TO NON-SHAREHOLDERS ON ORDER OF SHAREHOLDERS.—Shareholders, as such, in a corporation not the appropriator of water possess no rights as appropriators of water, and the practice of the corporation of recognizing shares of stock as "floating water-rights" and "selling water" for irrigating seasons to persons who are not water-right holders in the company upon the orders of shareholders, is the same in effect as though it supplied such users with water without the consent of such shareholders.
14. SAME—DIVERSION—CHANGE IN MEANS OF—ABANDONMENT.—Where it appears that plaintiff appropriated water through a certain ditch, and thereafter, on account of increased diversion of water by defendant's and other canals further upstream and the difficulty of maintaining his former canal, changed his mode of diversion to defendant's canal, which served his land with water for ten years, and then in an action against other canals involving the right to

divert water defendant secured a decree in its favor, establishing its right to divert water for plaintiff's land, defendant is estopped from claiming that plaintiff has abandoned his appropriation through the former canal.

15. **SAME—CANAL COMPANIES—PRIVATE AGENT.**—A corporation, not an owner or possessor of arable or irrigable lands, diverting water from a public stream for the purpose of supplying the owners or possessors of arable or irrigable lands, and confining its service to the diversion and carriage of water, as the agent of particular appropriators of water, with whom it has fixed contractual relations binding it to perform such service, is a private agent, and cannot be compelled to render such service to others.
16. **SAME—SAME—PUBLIC AGENT.**—A corporation not an owner or possessor of arable or irrigable lands, if it undertakes to and does divert and carry water for the use of consumers of water, not as the agent of particular appropriators, with whom it has fixed contractual relations to furnish water, becomes a public agent, and cannot under the law discriminate by giving preference other than with due regard to priority of appropriation.
17. **SAME — SAME — WATER-RIGHTS — TRANSFER—UNDER WHAT CONDITIONS ALLOWABLE—MUST BE ATTACHED TO PARTICULAR LAND.**—A shareholder in an irrigation company who is also a water-right holder by virtue of his ownership of a share of stock and the ownership or possession of arable and irrigable land irrigated by means of such water-right may not assign such water-right to another to be used upon lands which the assignor does not own or possess while said assignor retains the land to which such right is attached, since a water-right, to be effective, must be attached to and pertain to a particular tract of land, and cannot be made to do duty to such land as well as to land not owned or possessed by such water-right holder at the will or option of the latter.
18. **SAME — SAME — CANAL COMPANY—CORPORATIONS—PUBLIC AGENT—NON-WATER-RIGHT HOLDER—RIGHT TO SERVICE—DISCRIMINATION.**—A corporation, by adopting and continuing the practice of supplying water to others than its water-right holders owning or possessing arable or irrigable land, not being itself an appropriator of water carried or the owner thereof, and dealing with public property, became a public agency to the extent that plaintiff at the time he made his application for water, although not the owner or lessee of a water-right, was entitled, upon the payment of the charge for similar service to other non-water-right holders, whether holders of orders from water-right holders or not, to have delivered upon his lands water sufficient for the irrigation thereof, in preference to other non-water-right holders whose appropriations were subsequent in time.
19. **SAME—SAME—SAME — DUTY TO SERVE NON-WATER-RIGHT HOLDERS SECONDARY.**—Non-water-right holders in an irrigating canal cor-

poration are not on a parity of right with water-right holders therein, the corporation owing a first duty to supply the needs of its water-right holders and a secondary duty to serve surplus waters to the non-water-right holders.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Reversed.

The facts are stated in the opinion.

W. H. Stilwell, and Joseph H. Kibbey, for Appellant.

An appropriation is a diversion of water from a natural stream united with an application to a beneficial use. *Wheeler v. Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; *Farmers' High Line etc. Co. v. Southworth*, 13 Colo. 11, 21 Pac. 1028.

"The right to use the water is the essence of appropriation. The means by which it is done are incidental." *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809.

"The appropriation of water for a specific purpose qualifies such appropriation, by limiting the volume to the quantity necessary for such purpose." *Colorado Milling Co. v. Larimer Irr. Co.*, 26 Colo. 47, 56 Pac. 185; *Ostman v. Dixon*, 13 Cal. 33; *McKinney v. Smith*, 21 Cal. 374.

"An appropriator of water from a stream already partly appropriated acquires a right to the surplus or residuum he appropriates; and those in whom prior rights in the same stream are vested cannot enlarge or extend their use of water to his prejudice." *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Cache La Poudre v. Water Co.*, 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 320; *Water Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685.

"Intention is a most important factor in determining the validity of an appropriation of water. This fixes the limitation as to quantity of water necessary, according to acts, diligence, and needs of the appropriator." *Colorado M. and E. Co. v. Larimer Irr. Co.*, 26 Colo. 47, 56 Pac. 185; *Power v. Switzer*, 21 Mont. 523, 55 Pac. 35.

"Water appropriated to public uses becomes subject to the public uses declared by the constitution [Cal.], without reference to the mode of its acquisition by either party, and right

to continued use does not depend upon covenants of contracts." *San Diego County v. Sharp*, 97 Fed. 399.

"It is not determined by the size of the ditch, but by the amount actually applied to a beneficial use. Prior appropriation governs in New Mexico Territory and water-rights must be determined by it." *Millheiser v. Long*, 10 N. Mex. 99, 61 Pac. 113.

C. F. Ainsworth, and L. H. Chalmers, for Appellee.

SLOAN, J.—The facts presented by the record are as follows: The Salt River Valley Canal Company is a corporation organized under the General Incorporation Act of the territory, and its articles bear date the sixth day of September, 1875. The articles recite that: "We, the undersigned, being desirous of forming a corporation for the purpose of supplying a portion of the valley lying upon the north side of the Salt River, and in the vicinity of the town of Phoenix, with water for irrigation and for milling, manufacturing, and mechanical purposes, under and in pursuance of the laws of the territory of Arizona, do hereby certify and declare as follows: First. That the said corporation shall be known by the name of the Salt River Valley Canal Company. Second. That the object of the said corporation shall be to carry on and conduct the business of supplying a portion of the valley lying upon the north side of Salt River, in the county of Maricopa and territory of Arizona, and in the vicinity of Phoenix, with waters for irrigation and for milling, manufacturing, and mechanical purposes, and to this end and for this purpose to purchase, construct, build, or dig such canals, ditches, or flumes as may be necessary to convey water from Salt River; taking it from said river at a point at or near the head of the old ditch used by the Swilling Irrigating Canal Company, and conveying said water to such point or points in the above-described valley of Salt River as may be necessary for the disposal of or use of said water. Third. The amount of capital stock of said corporation or company shall be twenty thousand dollars, which will be divided into forty shares of the value of five hundred dollars each." It appears that prior to the organization of the Salt River Valley Canal Company a company known as the "Swilling Irrigating Com-

pany" owned and operated what was known as the "Swilling Canal," which had been constructed prior to the year 1871. It further appears that the incorporators of the defendant company were for the most part stockholders in the Swilling Irrigating Company, and that one of their purposes in organizing the defendant company was to purchase what was known as the "South Branch," or "Middle Extension," of the Swilling canal, the property of the Swilling Irrigating Company. After the organization of the defendant company the stockholders in the Swilling Irrigating Company whose lands were irrigated from this South Branch, or Middle Extension, of the Swilling canal, joined in a conveyance of the water-rights held by them in the Swilling canal, and of their interests in the Swilling canal, to the defendant company, and received in exchange therefor shares of stock in the defendant company to the amount of thirty-seven shares. As there were forty shares of stock in the defendant company, three shares were left undisposed of after the issuance of the thirty-seven shares in exchange for the water-rights and stock in the Swilling Irrigating Company. These three shares were subsequently sold by the company at public auction. In 1884 the capital stock of the Salt River Valley Canal Company was increased to fifty shares, and the additional ten shares sold to various persons. The shares of stock issued by the company were in the ordinary form used by corporations. These shares, however, were treated by the holders thereof and by the defendant company, as a corporation, as representing water-rights in the company's canal. Until the year 1888 each holder of a water-right was permitted to take from the canal and use as much water as his needs might require for the irrigation of the lands which he cultivated. In fact, during these years it does not appear that there was any scarcity in the amount of water available which made it necessary to put any limitation upon the amount of water which each holder of stock might use. During the year 1888, by resolution adopted by the company, each shareholder was limited to one hundred miners' inches of water, measured under two inches pressure, which he might have delivered to him through the company's canal under and by virtue of each share of stock. This amount was subsequently reduced to eighty inches per share. Prior to the year 1884 it was the

practice of the company to sell water, as it was called, to others besides stockholders; a higher price for such service being charged to such purchasers as were not the holders of stock than to the shareholders. In 1884 the company, by resolution, adopted the policy of selling water to shareholders in the company and to those renting or representing shares in the company, and this policy has ever since that date been followed. Under this resolution of the company the practice grew up of shareholders from year to year renting their shares or parts of shares to others, and these lessees were permitted to purchase from the company water during the irrigating seasons upon the same terms and in the same amounts as were permitted to shareholders. The water-rights represented by the shares of stock were treated and regarded as not appurtenant to any particular lands, but were regarded as entitling the owner or lessee to purchase water up to the maximum amount to which each was entitled, and to apply the same upon any land he chose to cultivate during the irrigating season. One who was not a stockholder, and who desired water from the canal for purposes of irrigation, would lease a share or part of a share, and obtain an order from the owner thereof, and this order was honored by the company by the sale to the lessee of water for the irrigating season at the same rate which was charged the shareholder. An attempt was made in the year 1887 to change the policy theretofore adopted, and to divide each water-right represented by a share of stock into three, which would make, in all, one hundred and fifty water-rights. The resolution of the company upon this subject stated that its purpose was to distribute these water-rights by way of dividends to the shareholders, and this was called "creating water-rights." While the expressed purpose was that of "creating water-rights" by way of dividends, it is clear that the real purpose was that of abolishing the floating water-rights attached to shares of stock, and making them appurtenant to particular tracts of land. These water-rights in form were deeds of conveyance, and contained certain conditions limiting the amount of water which could be purchased annually by the holder thereof, and which he was entitled to have delivered to him, the manner of distribution of the water, the annual charge to be collected by the company, and other conditions establishing and fixing the

rights and privileges which each holder should enjoy. The resolution of the company made it optional upon the shareholders to accept these water-deeds, and, as a matter of fact, the great majority of the shareholders declined to accept them.

The plaintiff, Slosser, is the owner of land described in his complaint, and this land is situated near the westerly end of the defendant's canal. Plaintiff purchased this land from one King Woolsey during the year 1877. At that time about ninety acres of this land had been cultivated. Plaintiff's grantors began the cultivation of this land in the year 1871, and water for this purpose was obtained first from the canal known as the "Chivari Ditch," the head of which was below that of the Salt River Valley company's canal. In January, 1874, the head of the dam of the Chivari ditch was destroyed by a flood, and seems never to have been rebuilt. The owners of stock in the Chivari ditch, including plaintiff's grantors, after the destruction of said ditch obtained water-rights in what was known as the "Monterey Ditch." Plaintiff's land was irrigated from the Monterey ditch until 1877, after which date, until the year 1880, plaintiff obtained water from what was known as the "Farmers' Ditch." As all of these ditches headed at points on the Salt River, below the head of the Salt River Valley canal and other canals, it became difficult to keep the Farmers' Canal supplied with water. During the year 1880 plaintiff obtained water from the Salt River Valley canal, by the payment of the yearly charge therefor made by the company; and plaintiff has continued ever since, with the exception of one or two seasons, to irrigate his land from the latter canal until denied this right by the defendant company. At one time it appears that plaintiff controlled a one-half share of stock in the Salt River Valley Canal Company, and by means of this obtained water from the company. After the adoption of the resolution by the defendant company limiting its sales of water to shareholders and lessees of the same, plaintiff complied therewith, and obtained orders from various shareholders, and obtained his water by means thereof. In November, 1895, plaintiff applied for water for the ensuing irrigating season at the company's office, but was denied the right, upon the ground that, not being the owner of a share of stock, he had not obtained an order from any

shareholder therefor. He thereupon brought suit in the district court of Maricopa County, praying for a mandatory injunction requiring the defendant company to deliver to him the water which he had applied for upon the same terms and conditions required of shareholders and their lessees. The relief prayed for by plaintiff was granted by the trial court. In 1899 plaintiff again applied for water and tendered the amount charged by the company for such service during the irrigating season of that year, and was again refused, whereupon plaintiff brought this suit. The case was heard by the court, and judgment rendered for the defendant, denying the injunction prayed for and dismissing the complaint. From the ruling of the trial court denying plaintiff's motion for a new trial, this appeal is brought. The assignments of errors made by the appellant in his brief are based upon alleged errors in the findings of the trial court, and in the conclusions of law drawn therefrom, and upon the judgment rendered in accordance therewith.

The theory under which plaintiff claims the relief sought is that he is an appropriator of water, and as such is entitled to the service of the defendant company in the delivery of the water called for by his appropriation, upon the payment of the fixed charges of the company for such service, and that the defendant company, not being itself the owner of the water diverted by it, and being but a public agency for the carriage of water and delivery of the same to appropriators owning or possessing lands under it in the order of the priority of their appropriation, cannot refuse him such service. The theory of the defendant, on the contrary, is, that the Salt River Valley Canal Company is in no sense a public agency, and possesses the right to dispose of the water it diverts, to its shareholders or to others, as it may elect, upon such terms and conditions as it may provide; that the plaintiff, not being the owner of a share of stock or a water-right deed, is not in privity of contract with it, and therefore has no right to require its service, or to compel it to furnish him water for the irrigation of his land. It is further contended by the defendant that the plaintiff has lost by abandonment his right of prior appropriation, and is now on the footing of a landowner who is not the owner of any water-right in its canal or in the water which is diverted thereby. These conflicting

contentions involve the consideration—First, of the *status* of the Salt River Valley Canal Company and its shareholders; second, the *status* of the plaintiff to the defendant company by virtue of his former appropriation of water by himself and his grantors under the various canals from which he obtained water for the irrigation of his lands prior to 1880, and his subsequent dealings with defendant company since that date. In the consideration of the questions involved, it will be noted that we have confined our examination largely to the statutes of the territory, and have not attempted to review the decisions of other courts relating to the same general subject. An examination of the statutes of the various states and territories where the doctrine of prior appropriation is recognized and enforced will disclose that the legislation of this territory differs fundamentally, upon the subject of appropriations of water for beneficial uses, from the legislation of other states and territories, with the single exception of the territory of New Mexico. Arizona prior to its organization as a territory constituted a part of the territory of New Mexico, but originally, and before the annexation under the treaty of Guadalupe Hidalgo and the subsequent purchase under the Gadsden treaty, of that part of the territory lying south of the Gila River, constituted a part of the state of Sonora. The first legislation by the territory followed closely the old Spanish and Mexican laws upon the subject of water-rights, as these had been incorporated in the statutes of New Mexico. Under these Mexican and Spanish laws enforced in the state of Sonora the holding of land was the basis for any valid appropriation or use of water from a public stream. The community ditch, or “public acequia,” as termed in the Howell Code, was the usual and ordinary means for the diversion of water. Each village or group of farmers constructed its own common ditch. The management and control of this ditch was regulated by law, and not by the agreements or contracts of the users of water under it. Such ditches were recognized and treated as public property, in much the same way that a public road under our laws is regarded. Hence every landowner under it, whether he used water or not, was required to contribute his quota of labor in the maintenance and preservation of the ditch. The law regulated the matter of priority of right upon the basis of land titles. The oldest

titles, in times of scarcity, conferred upon the owners the prior right to the use of water from the public acequia. As we will see, the principles of the Sonora law regulating the rights of users of water from a public stream diverted by means of a public acequia were adopted; and in those sections of the statute of our territory which permitted the construction of private ditches and their ownership by individuals the same principles were recognized, to the extent that the ownership or possession of arable and irrigable land was made the basis of the acquisition and enjoyment of the right of appropriation. Whatever, therefore, may be the law as declared by the supreme court or court of appeals of Colorado, or the courts of last resort of other states and territories having a dissimilar history, or whose water laws have grown out of the local customs of miners, as in California and Nevada, these are not controlling, and are not even authoritative in the decision of questions which arise, as in this instance, wholly and entirely under our own peculiar statutes. The various congressional acts pertaining to water and water-rights, beginning with the act of July 26, 1866, have recognized the local laws, customs, and decisions of courts as controlling in the matter of the acquisition, enjoyment, and disposition of rights to the use of water on the public lands, and hence do not need to be especially considered.

As we have seen, the articles of incorporation of the Salt River Valley Canal Company were drawn under the General Incorporation Act in force at the time of the incorporation. This General Incorporation Act did not recognize ditch or canal companies as possessing rights and privileges beyond that of other incorporations. The professed purpose of the incorporation was to divert and deliver water from the Salt River for use upon the lands covered by it. The corporation, as an entity, has never been the owner or possessor of any land, except such as is included within its right of way. Under the law as it existed at the time of its incorporation, did it become, and did it acquire rights as, an appropriator of water? Section 22 of the bill of rights (Rev. Stats. Ariz. 1901, par. 22), which is to be considered simply as an act of the legislature, provided that "all streams, creeks, and ponds of water capable of being used for the purpose of navi-

gation or irrigation are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose." It may be contended that under this act a corporation was recognized as possessing the same right as an individual to appropriate water, and doubtless this is true, but the restriction provided by the legislature upon the subject of appropriations of water from a public stream apply alike to individuals and corporations. This is made clear when we examine sections 1, 3, and 7 of chapter 55 of the Compiled Laws (Rev. Stats. Ariz. 1901, pars. 4174, 4176, 4180), which were in force at the time the company was organized. Section 1 (par. 4174) reads as follows: "All rivers, creeks and streams of running water in the territory of Arizona, are hereby declared public, and applicable to the purposes of irrigation and mining as hereinafter provided." Said section 3 (par. 4176) provided "that all the inhabitants of this territory, who own or possess arable and irrigable lands, shall have the right to construct public and private acequias and obtain the necessary water for the same from any convenient river, creek or stream of running water." Section 7 (par. 4180) reads: "When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water or so much thereof as shall be necessary for said purposes," etc. It will be observed that in section 3 (par. 4176) acequias or ditches are divided into two classes,—public and private. Other sections of the statute clearly define and set forth the nature, rights, and privileges of public acequias. In section 3 (par. 4176) the ownership or possession of arable and irrigable lands is distinctly stated to be a condition precedent to the construction of an acequia, and the diversion of water for the same from any river, creek, or stream of running water. In said section the term "inhabitants" is used as descriptive of those who possess the right to appropriate water for agricultural purposes. In section 7 (par. 4180) the term "person or persons" is used in a like connection. The word "inhabitants" is one of great variation of meaning. Primarily it refers to one who is an established or permanent resident of a particular place. An

examination of the authorities shows, however, that it is frequently given a much broader meaning than this. In *Tripp v. Insurance Co.*, 12 R. I. 435, a mutual insurance company organized under the laws of the state of Rhode Island was considered an inhabitant of the place where its principal office was situated, for the purposes of taxation. In *Bank v. Bunnell*, 10 Wend. 186, an incorporated bank was held to be an inhabitant of the place where it did business. Other courts have held, however, that the term "inhabitant," as used in statutes, cannot be made to apply to incorporated companies. *State Bank v. Charleston City Council*, 3 Rich. Law, 348; *Hartford Fire Ins. Co. v. City of Hartford*, 3 Conn. 15. The word "person," used in section 7, has been uniformly held to include both natural and artificial persons, unless the context clearly shows that the statute was intended to imply and to be restricted to the former. The decisions upon this point are too numerous to be here cited. We think that, construing section 3 (par. 4176) and section 7 (par. 4180) together, a corporation is included among persons authorized and empowered to construct acequias and make an appropriation of water for agricultural purposes. The condition, however, upon which this may be done applies alike to individuals and corporations, in this: that both must, in order to enjoy this right, own or possess arable and irrigable lands. The record shows that the Salt River Valley Canal Company at the time of its organization did not own or possess such lands. It succeeded to the property known as the south or middle extension of the Swilling Irrigation Company. This property consisted of a dam and canal, constituting a mere conduit for water. So far as the record shows, the company has never since its organization been the owner of any such lands. If, therefore, the ownership or possession of arable and irrigable lands is essential to the acquisition of a "water-right," as it is called under the statute, then the Salt River Valley Canal Company was not at the time of its organization, nor has it even been, an appropriator of water. If not an appropriator, what, therefore, is its *status* as a carrier of water? The definitions given of an appropriation of water have not been uniform. They, however, all agree in this: that it involves the idea of the use or application of water from a public stream for a beneficial purpose, under conditions prescribed

by statute, or by custom having the effect of law, so as to vest a permanent right to such use and application. Such use and application necessarily involve, in order to constitute a permanent right, an equally fixed or permanent ownership or control of the means by which the use and application may be enjoyed. In the very nature of things, a conduit of some sort, by which water in a public stream may be diverted and conducted upon the land of the appropriator, is necessary. It has never been held that an exclusive ownership in such conduit is essential. Means of diversion may be owned in common by a number of appropriators, or such means may be owned by one person and the appropriation of water by another, provided the latter has a fixed or permanent right, by contract or otherwise, entitling him to the service of such means for the purpose of his appropriation. The great cost of constructing dams and canals, and the maintenance of these when constructed, and the advantages in the way of conservation and saving of water which result on the erection and maintenance of large and permanent dams and canals, preclude the policy of restricting the ownership and control of such dams and ditches to actual appropriators. The difficulties arising from the ownership and control of such means of diversion by one or more individuals as tenants in common are such as to make it necessary, almost, that corporations be organized for this purpose. Such corporations have been organized, and their rights to the ownership and control of their property have been recognized, in all the arid states and territories. In some instances such companies have issued what are termed "water-rights" to landowners, which give to the latter, on certain terms and conditions, a permanent right to the service by such companies through their canals of water for the irrigation of their lands. In other cases the practice has been to recognize the right of a stockholder to this service by virtue of his holding shares of stock. The land department of the government has recognized such a contract, under the Desert Land Act of 1887, which required of an applicant for desert land, in order to obtain title, that he show his right, based upon *bona fide* prior appropriation, to the use of water to the extent necessary for the irrigation and reclamation of such land, as sufficient evidence of an appropriation to entitle one to acquire the title of the government. The appro-

priator may thus, immediately, by constructing and owning his own ditch or canal, or, mediately, by acquiring the permanent right to the service of another's ditch or canal, whether the latter be owned by a natural or artificial person, perfect his appropriation. A corporation thus organized for the purpose of furnishing water for agricultural purposes, to be used by others in privity of contract with it, becomes the mere agent of the latter, and, under the statute, may divert from a public stream water which the latter may acquire and use for purposes of irrigation. The measure of its right so to do is the needs and requirements of those owners or possessors of arable and irrigable lands with whom, by contract, it stands in relation as agent. The doctrine of agency, therefore, unless we concede to such corporations a right not enjoyed by other inhabitants under the statute, must be invoked, in order to confer upon them any right to the diversion of water from a public stream. This precludes the idea that a corporation which constructs an irrigating canal for the purpose of diverting public waters acquires any rights beyond what it could acquire were it a natural person, and it must therefore connect itself by contract, unless it be the owner or possessor of arable and irrigable lands, with those who do own or possess such lands before it may take into possession and under its control water which is dedicated by the statute to the public, and which is applicable for purposes of irrigation or other beneficial uses. The warrant for the diversion of water by incorporated companies which do not own or possess arable and irrigable land must be found in the fact that they supply actual users or appropriators. Their right to divert water from a public stream depends wholly upon the use which is made of it, and is measured by the rights of its users as appropriators. Such a company, therefore, is to be regarded as a mere agency by which appropriations of water made by the owners or possessors of arable and irrigable land are made effective. Water, being public property in a running stream, continues to be public property even when diverted for beneficial uses, and remains such until actually applied to such uses. Our statutes do not recognize the right of ownership of water, as distinct from its use or application. Whenever an appropriator of water ceases to use for a beneficial purpose any water which has its source in a public stream,

his power or authority to control the same ceases. A corporation, therefore, which is not itself an appropriator, cannot, by the mere ownership of the dam or canal, and by virtue of its diversion of water from a public stream by means of the same, become the proprietor or owner of public waters. Whenever, therefore, it does not connect itself in the diversion and carriage of water with those who have the right to make a beneficial use of the same, it becomes, in a sense, a trespasser; and its diversion and carriage of such water are without authority of law. We do not mean to imply that a corporation may not lawfully divert and carry water, and supply the public generally, without regard to fixed contractual relations with the consumers. Inasmuch as it is dealing with public property the use of which is restricted to public purposes, it is nevertheless bound, in the distribution of the water it carries, to recognize the rights of its consumers as fixed by the statute. If it confines its service to the diversion and carriage of water from a public stream as the agent of particular appropriators of water, with whom it has fixed contractual relations, it owes no duty to others, whether appropriators or not. If, however, it undertakes to and does divert and carry water from a public stream, and undertakes to serve consumers of water, not as the authorized agent of particular appropriators, its *status*, not being that of an appropriator or the owner of the water it carries, must become that more nearly akin to the public *acequia* than the private *acequia*. When it ceases to become a private agency of particular appropriators, unless we recognize the right of such companies to the diversion of public water as exceeding that of a natural person, and concede to them ownership in the water diverted, it must follow that it becomes, in a sense, a public agency. Were it not for the fact that appropriators of water from a public stream do not have equal rights to the use of such water, but each appropriation, as against other appropriations, depends for its priority upon the time when it was made, the *status* of a corporation undertaking to supply consumers of water for agricultural purposes, without regard to fixed contractual relations, would become that of a public carrier. Some of the courts in the arid states have chosen to regard such corporations as, in a sense, public carriers. Inasmuch as, in the nature of things, their ability to supply the public with water must be

limited, and as the consumers, under the law of prior appropriation are not and cannot be upon the same footing as to their rights to the use of such water, the statutory term, "public acequia," more accurately describes their character and *status*. At any rate, it is clear to us that the law governing public acequias, or the conflicting rights of independent appropriators from a public stream, must control such companies in the disposition of the water they divert and convey, to the extent that they must regard the maxim that, as between consumers, *qui potior est in tempore, potior est in jure*.

Having in view these general principles, we will now consider in what manner they apply to the defendant company. As we have seen, since the organization of the Salt River Valley Canal Company, and all through its history, its shareholders have been regarded as water-right holders as well; each share of stock being treated as carrying with it, as an incident to its ownership, a water-right in the canal. As between the corporation and its members, and between the shareholders themselves, there can be no question but that such shares of stock, and the ownership of the same, may establish all the rights to the use of water which would follow were the owners of such shares tenants in common in the canal, provided each stockholder claiming such right has made an actual application of it to a beneficial use. As said by the supreme court of Colorado, in *Combs v. Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966, "Individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert unappropriated waters of a natural stream. They may provide that their several interests in such an enterprise shall be represented by shares of stock." And as said by Mr. Justice Hayt, of the same court, in *Strickler v. City of Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313: "A stockholder in an irrigating company, who makes an actual application of water from the company's ditch to beneficial use, may by means of such use acquire a prior right thereto; but his title to stock, without such use, gives him no title to the property." Had the defendant company confined its diversion and carriage of water to the extent of supplying its shareholders who are the owners or possessors of arable and irrigable land, to the extent of their needs, as the mere agent

of such appropriators, it would have remained a mere private ditch company, and would have owed no duty to others than its shareholders. As we have seen, for many years after the organization of the company it supplied others than its shareholders with water. After 1884 it restricted its service to its shareholders, and to those who obtained an order from shareholders, as the lessees of shares for particular irrigating seasons, but did not confine itself to supplying water for the irrigation of lands which its shareholders, as water-right holders, either owned or possessed. It respected the assumed rights of its shareholders to the extent of supplying those who might obtain the consent of such shareholders to use water called for by such water-rights. At the time when plaintiff made his application to the company for water, the testimony shows that the company was undertaking to supply others besides its shareholders with water for the irrigation of lands which the latter neither owned nor possessed, upon the assumption that such shareholders were entitled, under their appropriations and water-rights, to lease or assign them for particular seasons, to be used upon any lands whatsoever.

As we have seen, the statutes make the ownership and possession of lands essential to a valid appropriation of public water. A water-right, therefore, to be available and effective, must be attached to the land, and become, in a sense, appurtenant thereto. It follows, therefore, so long as such water-right is attached to a particular tract of land it cannot be made to do duty to other land. The law does not recognize that an individual appropriator of water, having a prior right to the use of the same, may, indiscriminately, by himself or others, make it apply, so as to retain its priority, to any land whatsoever. If a canal company is not an appropriator of water, and possesses no right as such, and if it may divert public water only for the purpose of supplying appropriators, and in thus doing must regard the law of priority, a shareholder of such company, as such, can possess no right which is not enjoyed by the company. It appears, too, from the testimony that some of the shareholders whose orders were respected by the company were not owners or possessors of land, and hence not appropriators, under the statute. And, if an individual appropriator of water cannot make his appropriation do duty to land to which it is not attached, his owner-

ship of a share of stock in such company cannot enlarge his right. The recognition, therefore, of these shares of stock as "floating" water-rights is not warranted by law; and the practice, therefore, of the company, of "selling water," as it is termed, for irrigating seasons, to persons who were not water-right holders in the company, upon the orders of shareholders, was the same, in effect, as though it had supplied such users with water without the consent of such shareholders.

The proof shows that plaintiff and his grantors have cultivated the land which he now owns from 1871 to 1880, under various canals in which plaintiff and his grantors were the owners of water-rights. Since 1880, with the exception of one or two years, whatever water plaintiff has had for the irrigation of his land has been obtained from the Salt River Valley canal. The circumstances under which plaintiff changed his use from the Farmers' canal to the Salt River Valley canal are shown to have been the difficulty of maintaining the Farmers' canal, and the scarcity of water at its head, due to the diversion by the defendant company and other companies owning canals which headed further up the river. It is contended by the defendant that the abandonment of the Farmers' canal by its water-right holders, including the plaintiff, operated as an abandonment of their appropriations of water. Whatever may be the *status* of other water-right holders in the Farmers' canal, the defendant company, as late as 1890, in the suit known as "Wormser against the Salt River Valley Canal Company," tried in the court below, which case involved the rights of various canals in the Salt River Valley to divert the water from Salt River, acknowledged plaintiff's right as an appropriator of water, by setting up such right, introducing proof to the same, and obtaining an adjudication in its favor, sustaining its right to divert and carry water necessary for the irrigation of plaintiff's lands. If plaintiff had not lost his right as an appropriator of water by obtaining water from the Salt River canal from 1880 to 1890, it cannot be very well contended that under the same circumstances his right was lost to him between 1890 and 1896, when he was first denied the right of obtaining water from the defendant's canal. Forfeitures are not favored in law, and we hold, therefore, that the circumstances under which plaintiff ceased to obtain water from the Farmers' canal, and

his use of water from the defendant's canal, coupled with the acknowledgment as late as 1890 by the defendant company of his right as an appropriator, do not show such forfeiture, but, on the contrary, establish his *status* as a valid appropriator of water from the Salt River. We do not hold that the plaintiff has acquired any contractual right to the service of said company which would entitle him to compel from said company the delivery of water for the irrigation of his lands, by virtue of such contractual relation, whenever the company confines its diversion and delivery of water to its stockholders to be used by the latter upon lands owned or possessed by them. On the other hand, we hold that his rights in the premises, so far as the defendant company is concerned, rest upon the fact that the defendant was not, at the time of plaintiff's application for water, confining its service to supplying its water-right holders for the irrigation of lands which they owned or possessed. In determining, however, whether plaintiff, as against others similarly situated, so far as the company is concerned, was entitled to the service of the company, under the law of prior appropriation, and the duty of water companies which occupy the relation of public agency in the diversion and carriage of water, we must look to the date of his appropriation, and therefore his priority of right. We think the denial by the defendant of plaintiff's application, under the circumstances shown by the record, was unwarranted, and he should have been accorded this right in preference to the holders of leases from the shareholders for use upon lands not owned or possessed by said shareholders, who were subsequent appropriators.

The importance of the questions presented by the record is such that we feel called upon to define with certainty the position we have taken, and to this end to give a brief résumé of the points decided, with a statement of those which we do not decide, which grow out of a consideration of the points decided in a collateral way, although not necessary in arriving at the result reached: We hold that the ownership and possession of arable and irrigable land is essential, under the statutes, for the acquisition of the right of appropriation of water from a public stream for purposes of irrigation. We hold that a corporation not the owner or possessor of arable and irrigable land may lawfully construct a dam, canal, or

other conduit of water, and divert from such stream water for purposes of irrigation, but that in so doing it becomes in no sense an appropriator or owner of the water so diverted. Its *status* is that of either a private or public agency, depending upon whether its diversion is for the purpose of supplying owners or possessors of arable and irrigable land with whom it has fixed contractual relations, binding it to perform such service, or whether its purpose or practice be to supply owners or possessors of such land who are not its water-right holders, or with whom it has not bound itself by contract to permanently render such service. If it confined its service as the private agent of certain appropriators, it cannot be compelled to render service to others. On the other hand, if it undertakes to and does divert and carry water for the use of consumers with whom it is not bound by such contracts, and hence becomes a public agency, it cannot, under the law, discriminate by giving preference otherwise than with due regard to priority of appropriation. We further hold that a shareholder in such a company who is also a water-right holder by virtue of his ownership of such share of stock and the ownership or possession of arable and irrigable land irrigated by means of such water-right may not assign such water-right to another, to be used upon lands which the assignor does not own or possess, for any particular season, so as to confer upon the assignee his priority of right, and that such company does not possess the right to discriminate in favor of such holders, as against other appropriators of water under its canal, who were prior in right. In other words, a water-right, to be effective, must be attached to and pertain to a particular tract of land, and is in no sense a "floating" right. We do not wish to be understood as holding that a water-right which is so attached becomes inseparable from such land. That is to say, we do not hold that a prior appropriator of water may not convey his prior appropriation to another, without the land, so as to confer upon his vendee of such water-right all the rights which the vendor may possess, provided such vendee makes a beneficial use of such water-right upon lands which he owns or possesses. But we desire to be understood simply as holding that, so long as a water-right is attached to a particular piece of land, it cannot be made to do duty to such land, and as well to other land not

owned or possessed by such water-right holder, at the will or option of the latter. In the briefs, as well as in the very able and elaborate argument made by counsel for appellee, the right of shareholders to do this, and the duty of the defendant company to recognize the right, have been strenuously argued. In this, however, we think counsel confuses the right of an appropriator to sell or transfer by conveyance his water-rights to another with the assumed right in question. To recognize the right of a prior appropriator to lease his water-right independent of his land would, as we conceive, be subversive of the underlying principle of our water-right law. The right of alienation of a water-right is one which is based upon the general right of property, and arises out of the necessity, in order that injustice may not be done to the owner, of permitting such alienation, for the reason that it frequently happens, through no fault of the owner, and by the operation of natural laws, that land to which water-rights have been attached becomes unsuitable for cultivation. Floods frequently wash away and destroy farming lands, or leave deposits of coarse gravel and bowlders upon them; and other natural causes frequently render such lands not only unprofitable, but impossible of irrigation and cultivation. Natural justice, therefore, is subserved by recognizing the right of a water-right holder to change his appropriation, under such circumstances, to lands capable of profitable cultivation, or to sell his right to another, to be used by the latter for a beneficial use recognized by the statute. As the law must be certain and general in the matter of the right of conveyances, to admit the right of alienation under some circumstances must be the admission of that right under any and all circumstances. There was no principle of natural justice or of necessity that required the recognition of the right of a water-right holder to lease his water-right for particular seasons, while retaining the land to which it is attached; for so long as he may use his right in the cultivation of such land he enjoys all that the law confers in the first instance by virtue of his appropriation. In considering our peculiar statutes, it is well to bear in mind the fact that the only expression in our statutes upon the subject of priority of rights among appropriators from a common source for agricultural purposes is found in paragraph 3215 of the Revised Statutes (Ariz., 1887; Rev.

Stats. Ariz. 1901, par. 4191), which reads: "That during years when a scarcity of water shall exist owners of fields shall have precedence of the water for irrigation according to the dates of their respective titles or their occupation of the lands either by themselves or their grantors. The oldest titles shall have precedence always." And while this section applies primarily to public acequias, it is significant, taken in connection with paragraph 3201 (Rev. Stats. Ariz., 1887; Rev. Stats. Ariz., 1901, par. 4176), and negatives the idea that priority of appropriation is a mere personal right, which may be enjoyed otherwise than by its application upon particular lands. We hold further, therefore, that the defendant company, by adopting and continuing the practice of supplying water to others than its water-right holders owning or possessing arable and irrigable land, not being itself an appropriator of the water carried, or the owner thereof, and dealing, as it was, with public property, became a public agency to the extent that plaintiff at the time he made his application for water, although not a water-right holder of the company, was entitled upon the payment of the charge for similar service made to other non-water-right holders, whether holders of orders from water-right holders or not, to have delivered upon his lands water sufficient for the irrigation thereof, in preference to other non-water-right holders whose appropriations were subsequent in time, and that he is entitled to this service upon the same terms and conditions, so long as the defendant company continues to supply water to consumers under its canal who are not its water-right holders, whether upon the order of the latter or not, and thus continues to assume the *status* of a public agency in the diversion and carriage of water. We do not hold that the water-right holders in the Salt River canal are upon a parity of right with appellant and other non-water-right holders similarly situated to the service of the canal and to the water it diverts and carries. We assert that the canal company owes a first duty to supply the needs and requirements of the water-right holders. It is the surplus water remaining in the canal after this is done which is lawfully available to the latter class, and which must be disposed of by the company in the manner herein decided. Under the circumstances shown by the record, we hold that the appel-

lant was wrongfully denied water for the irrigation of his lands at the time he made his application, in May, 1899; it being shown that the appellee company during that season was engaged in supplying other consumers within the flow of its canal who were non-water-right holders, and thus, confessedly, was diverting and carrying water in its canal in excess of that needed and required by its water-right holders for the irrigation of lands to which their water-rights were attached, and it being further shown that appellant had the superior right to the use of such surplus water over other non-water-right holders thus supplied, by virtue of his ownership and possession of lands having an older right of appropriation. We further hold that, so long as appellant continues to be the owner or possessor of said lands, upon paying the usual and reasonable charge therefor, he is entitled to the same service, whenever and so long as the appellee company undertakes to and does divert and carry in its canal water from Salt River in excess of that needed and required by its water-right holders for the irrigation of lands owned or possessed by such water-right holders, and to which such water-rights are attached. The judgment of the trial court is reversed, and a judgment and decree will be entered in consonance with this opinion.

Doan, J., concurs.

DAVIS, J.—I do not concur in the opinion of the court in this case.

[Civil No. 754. Filed June 1, 1901.]

[65 Pac. 147.]

N. L. GRIFFIN, Defendant and Appellant, v. J. C. HURLEY, Plaintiff and Appellee.

1. MINES AND MINING—LESSOR AND LESSEE—MECHANIC'S LIEN—INTEREST SUBJECT TO—REV. STATS. ARIZ. 1887, PAR. 2276, CITED—GATES v. FREDERICKS, 5 ARIZ. 343, 52 PAC. 1118—EAMAN v. BASHFORD & BURMISTER, 4 ARIZ. 199, 37 PAC. 24, AND HADLEY CO. v. CUMMINGS, ANTE, P. 258, 64 PAC. 443, APPROVED.—Under the statute,

supra, providing that all miners, laborers, and others who may labor, and all persons who may furnish material of any kind, designed or used in or upon any mine or mining claim, and to whom wages are due for such labor or materials, shall have a lien upon the same for such sums as are unpaid, a miner, employed under a contract with the lessee of a mining claim, cannot foreclose a mechanic's lien upon the claim as against the owner, though entitled to subject the lessee's interest thereto.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Herndon & Norris, for Appellant.

J. C. Forrest, for Appellee.

STREET, C. J.—J. C. Hurley brought suit in the district court of Yavapai County against J. E. Harper and N. L. Griffin to recover the sum of \$740.95 upon four separate causes of action—the first cause of action for wages in the sum of \$292 for work done by him on the Hidden Treasure Mine; the second, for wages due Ben Herr, in the sum of \$180; the third, for wages due Joseph Hull, in the sum of \$185; and the fourth, for money due Stukey Brothers, in the sum of \$55.50, for materials furnished to be used in and upon the Hidden Treasure Mine,—which accounts were assigned to Hurley. He alleged that the work was done and the material furnished on the Hidden Treasure Mine, and that the defendants, Harper and Griffin, were the owners and reputed owners and in the actual possession thereof; that mechanics' liens had been filed to cover each of said accounts, and those filed by Herr, Hull, and Stukey Brothers had been assigned to him for a valuable consideration; and he asked that the liens be foreclosed and the property sold to satisfy the liens. Defendant Harper did not make an appearance, nor answer the complaint. The defendant Griffin made answer, denying each and every material allegation. The cause was tried to the court without a jury, and the court made its findings of fact, in effect, as follows: That the said defendant N. L. Griffin was on the sixth day of December, 1899, and long prior

thereto, and now is, the owner and reputed owner of the Hidden Treasure mining claim; that plaintiff, under a verbal contract and agreement with defendant J. E. Harper, performed work and labor as a miner in and upon said mine from the sixth day of December, 1899, to the seventeenth day of February, 1900, both inclusive, and that said defendant J. E. Harper is indebted to the plaintiff therefor in the sum of \$262, and that said defendant J. E. Harper was on the seventeenth day of February, 1900, indebted to the persons hereinafter named, upon a verbal contract, for work and labor done and performed as miners for the said defendant in and upon said mine, to wit: To Ben Herr, from the seventh day of December, 1899, to the seventeenth day of February, 1900, both inclusive, in the sum of \$180; to Joseph Hull, from the seventh day of December, 1899, to the seventeenth day of February, 1900, both inclusive, in the sum of \$185; that said defendant J. E. Harper at the time said labor and services were performed as aforesaid was in the possession and control of said mining property, under and by virtue of a lease and bond executed by the said defendant N. L. Griffin to the said J. E. Harper, and that said J. C. Hurley, at the time of performing the labor and services for J. E. Harper as aforesaid, knew that said mining property was being operated under a lease and bond from the owner of said mining property, N. L. Griffin, but had no knowledge of the particular terms and conditions of said lease and bond; that each of the above-named persons (Ben Herr and Joseph Hull), for a valuable consideration, on the nineteenth day of February, 1900, assigned his claim against the said defendant J. E. Harper to this plaintiff, which said claims, together with the amount due plaintiff for his said services as aforesaid, aggregate the sum of \$627. The court further found in favor of plaintiff as to filing mechanics' liens to cover said amount, and the bringing of the action in the manner and within the time prescribed by statute. The court made its conclusions of law and judgment as follows, to wit: "That said defendant J. E. Harper is indebted to plaintiff in the sum of \$654.47, with interest thereon at the rate of seven per cent per annum from the date hereof until paid, and that plaintiff is entitled to a lien upon said property therefor. Second. That plaintiff is entitled to a decree foreclosing his said lien, as prayed for

in his said complaint, upon the property hereinbefore described, to satisfy the sum of \$654.47 and the costs of this suit. Wherefore, by reason of the law and the evidence aforesaid, it is ordered, adjudged, and decreed that the said lien, as it existed on the said 7th day of December, 1899, upon the following property, to wit: The Hidden Treasure mining claim, situate in the Walker Mining District, county of Yavapai, territory of Arizona, the notice of location whereof is of record in book 19 of Mines, page 383, records of said Yavapai County, Arizona Territory,—be, and the same is hereby, foreclosed, and that the clerk of said court do issue an order of sale directed to the sheriff of Yavapai County, Arizona, directing and commanding him to seize and sell the above-described property and premises, as under execution, or so much thereof as may be necessary to satisfy this judgment, interest, and costs, and that he apply the proceeds thereof to the payment and satisfaction of the said sum of \$654.47, together with interest thereon from the date hereof at the rate of seven per cent per annum until paid, and the costs of this suit, taxed at the sum of \$28.75, together with all accruing costs. And, if the said property should sell for more than sufficient to pay said sum, then the said officer is hereby directed to pay over the excess to the said defendant N. L. Griffin. Done in open court this 13th day of October, 1900."

The question for this court to determine is whether the conclusions of law and judgment are supported by the findings. Both the defendants, Harper and Griffin, were alleged to be the owners of the property and in possession thereof. The findings of the court in reference to that allegation are that, at the time the labor was performed by the plaintiff and his assignors, Griffin was the owner of the property and Harper was in possession thereof by virtue of a lease, and that Harper was indebted to the plaintiff and his assignors under a contract with him alone, while the conclusion of law is that plaintiff is entitled to a decree foreclosing his mechanic's lien upon the property described to satisfy the amount due by Harper to the plaintiff and his assignors. The judgment is in accordance therewith. The conclusions of law and judgment are broad enough to subject Griffin's interest in the mine to the payment of the debt which Harper owed, and to foreclose a lien which might have been good against Harper's

interest, and sell the interest of Griffin to satisfy the same. We regard it as well settled that those owning debts contracted by lessees or others having an appreciable interest in lands, which have arisen in regard to the lands, may file a lien to protect the payment of such debt against the interest which said lessees or others having an appreciable interest in the land may have therein; but although a mechanic's lien may reach such interest, it cannot reach the interest of the owner of the fee, unless he is directly or by agency connected with the debt. Phillips on Mechanics' Liens, secs. 83 et seq., 191, 192. Our own supreme court, in the case of *Gates v. Fredericks*, 5 Ariz. 343, 52 Pac. 1118, has said: "Parties furnishing material or doing labor for a leaseholder undoubtedly may have a lien against the particular estate of the leaseholder; but to hold the owner of the property responsible, and his estate in the property responsible, would be to put the landlord at the mercy of the tenant. Under such circumstances, the tenant could make any kind of improvements at the expense of the property." It is quite common in Arizona for owners of mines or mining claims who are not able to work and develop the mines themselves to lease their mining property to some one who is willing and able to work and develop it, which process comes within the common appellation of "chloriding"; and in many parts of the territory chloriding is a settled industry, furnishing employment and profit to thousands of miners. Such chloriding contracts or leases have not in view either the improvement of the mine or its depletion, but only the operation of the mine for immediate profits, the same as the owner of a farm may lease his land to be cultivated, the lessee paying therefor as rent either money or a portion of the products. In such operation a mine may be improved,—it may be developed into a bonanza,—or it may be worked out and depleted. To hold that one who has leased a mine and takes the bulk of the proceeds, paying the owner of the mine but a share of the profits as rental, can so operate the mine that the miners working for him can file liens against any other interest in the mine than that which the lessee holds, would be destructive of the owner's rights. No such right is given by the statute. Paragraph 2276 of the Revised Statutes of Arizona, permitting miners to file liens, is as follows: "All miners, laborers, and others

who may labor, and all persons who may furnish material of any kind, designed or used in or upon any mine or mining claim, and to whom wages are due for such labor or material, shall have a lien upon the same for such sums as are unpaid." It may sometimes be the case that he who is called a "lessee" becomes an agent, and the instrument between the owner and the so-called lessee, although denominated a "lease," is in fact an operating contract for the benefit of the owner of the mine, in its development, in which case the so-called lessee may be declared to be the agent of the owner of the mine, as in *Eaman v. Bashford & Burmister*, 4 Ariz. 199, 37 Pac. 24; but as we said in the case of *Hadley Co. v. Cummings*, ante, p. 258, 64 Pac. 443, "It is the settled law that, before one can be entitled to a lien for labor performed or material furnished upon any property whatever, the labor performed or the material furnished must have been at the instance or request of the owner of the property, or some agent of his. Such agent may be either an agent in fact or in law."

The district court having found that Griffin was the owner of the mine, and Harper in possession only as a lessee, the judgment which was in effect that Hurley have foreclosure of liens and sale of Griffin's interest to satisfy Harper's debt, when Griffin had not in any way contracted the debt, was error. The judgment of the district court is reversed, and, without further trial, is modified so that Griffin is dismissed from the complaint, and his interest in the Hidden Treasure Mine released from the foreclosure proceedings.

Doan, J., and Davis, J., concur.

MEMORANDUM DECISIONS.

[Criminal No. 147.]

JIM WILLS, Appellant, v. **UNITED STATES OF AMERICA**, Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. **F. M. Doan**, Judge.

E. J. Edwards, for Appellant.

Robert E. Morrison, U. S. District Attorney, for Respondent.

January 14, 1901. Dismissed.

[Civil No. 753.]

JESSE T. JONES, Plaintiff in Error, v. **JOHN S. JONES** et al., Defendants in Error, and **JAMES G. MEGEATH**, Intervener.

WRIT OF ERROR from the District Court of the Fourth Judicial District in and for the County of Yavapai. **R. E. Sloan**, Judge.

E. M. Sanford, and **J. E. Morrison**, for Plaintiff in Error.

Robert E. Morrison, for Defendants in Error.

John J. Hawkins, for Intervener.

January 16, 1901. Dismissed.

[Criminal No. 154.]

DAN SULLIVAN et al., Appellants, v. **TERRITORY OF ARIZONA**, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. **George R. Davis**, Judge.

Charles Blenman, and **W. M. Lovell**, for Appellants.

C. F. Ainsworth, Attorney-General, for Respondent.

January 18, 1901. Dismissed for want of prosecution.

[Civil No. 736.]

THE TERRITORY OF ARIZONA, on the complaint of C. F. Ainsworth, Attorney-General, Appellant, v. **THE FORT WAYNE GOLD PRODUCTION COMPANY**, a Corporation, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

J. D. Bethune, for Appellant.

Baker & Bennett, for Appellee.

January 22, 1901. Dismissed for want of prosecution.

[Criminal No. 148.]

FRANCISCO GARCIA, Appellant, v. **TERRITORY OF ARIZONA**, Respondent.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge.

H. D. Ross, G. A. Allen, and J. E. Morrison, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

January 26, 1901. Affirmed.

[Criminal No. 146.]

GEORGE BLACKBURN, Appellant, v. **TERRITORY OF ARIZONA**, Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge.

Frank B. Laine, for Appellant.

C. F. Ainsworth, Attorney-General, and Wiley E. Jones, District Attorney, for Respondent.

January 26, 1901. Affirmed.

[Criminal No. 149.]

GEORGE W. WRIGHT et al., Appellants, v. TERRITORY
OF ARIZONA, Respondent.

APPEAL from the District Court of the Second Judicial
District in and for the County of Graham. F. M. Doan,
Judge.

E. J. Edwards, Moorman & McFarland, and Joseph Camp-
bell, for Appellants.

C. F. Ainsworth, Attorney-General, and Wiley E. Jones,
District Attorney, for Respondent.

January 26, 1901. Affirmed.

[Civil No. 696.]

THE GILA BEND RESERVOIR AND IRRIGATION
COMPANY, Appellant, v. PEORIA CANAL COM-
PANY, and ARIZONA CONSTRUCTION COMPANY,
Appellees.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
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J. B. Woodward, and Joseph H. Kibbey, for Appellant.

John S. Stevens, and Thomas Armstrong, Jr., for Appellees.

January 26, 1901. Affirmed.

[Civil No. 751.]

In the Matter of the Guardianship of the Persons and Estate
of HUGO ZECKENDORF, and HELENITA ZECKEN-
DORF, formerly Minors.

APPEAL from the District Court of the First Judicial
District in and for the County of Pima. George R. Davis,
Judge.

Rochester Ford, for Minors.

S. M. Franklin, for Guardian.

January 26, 1901. Dismissed.

[Civil No. 760.]

WILLIAM H. GOODMAN et al., Plaintiffs in Error, v.
DANIEL HUTCHINSON, Defendant in Error.

WRIT OF ERROR from the District Court of the Third
Judicial District in and for the County of Maricopa. Webster
Street, Judge.

Thomas Armstrong, Jr., for Plaintiffs in Error.

C. F. Ainsworth, for Defendant in Error.

November 1, 1901. Dismissed on motion of Plaintiffs in
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[Criminal No. 158.]

In the Matter of the Application of SANTIAGO BER-
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ORIGINAL APPLICATION.

J. L. B. Alexander, for Petitioner.

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APPEAL AND ERROR.

1. **APPEAL AND ERROR—ASSIGNMENT OF ERRORS—FAILURE TO MAKE—**
WAIVER OF ALL ERRORS NOT FUNDAMENTAL.—A failure to comply with the statutory requirements as to assignments of error amounts to a waiver of all errors which are not fundamental, and there being no assignment of error, and none appearing on the face of the record, the judgment must be affirmed. (*Gardiner v. Gardiner*, 73.)

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2. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—MUST BE SPECIFIC—
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trial, and the motion is based upon more than one ground, the
same will not be considered as distinct and specific by this court,
unless each ground is separately and distinctly stated in the assign-
ment of errors." *Held*, an assignment of error, "that the court erred
in overruling a motion for a new trial," is too general, and will not
be considered, notwithstanding act No. 21, Laws 1893, provides that
"Every motion for new trial shall specify generally the grounds
upon which the motion is founded." (Miller v. Douglas, 41.)
3. SAME—JUDGMENT.—The supreme court on appeal can render such
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4. APPEAL AND ERROR—ASSIGNMENT OF ERRORS—MUST BE SPECIFIC—
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ing upon the face of the record, the judgment must be affirmed.
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supra, relating to appeals provide, among other things, "that the
briefs of the plaintiff in error or appellant shall contain a distinct
enumeration, in the form of propositions, of the several errors
relied on, and all errors, not assigned in the printed brief, shall
be deemed to have been waived." The rules of court, *supra*, also
provide that all assignments of errors must distinctly specify each
ground of error relied upon. Where no errors are assigned, and
none appear on the face of the record, the judgment of the lower
court will be affirmed, notwithstanding there may exist a meritori-
ous defense which the defendant might have urged in the court
below. (Providence Gold Mining Company v. Marks, 74.)

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6. SAME—SAME—CANNOT RAISE ISSUABLE FACTS—MUST SHOW ERROR OF COURT IN RULING—RECORD—NO ERROR APPEARING IN, JUDGMENT AFFIRMED IF NO ASSIGNMENT OF ERRORS—ACT NO. 71, SEC. 4, LAWS OF ARIZ. 1897, AND RULES OF COURT CITED.—On appeal from judgment in favor of plaintiff, in an action on an adverse claim to a mining location, appellant presented no assignment of errors, but submitted two propositions in its brief, viz.: "First, that this action was not commenced within thirty days of filing the adverse; second, that the verdict is contrary to the evidence and the weight of the evidence." These propositions are of issuable facts, and do not assign or impute error in the rulings or judgment of the lower court. Therefore in accordance with the statutes and rules of court, *supra*, no error appearing in the record, the judgment will be affirmed, although appellant might be able to establish both facts as set forth. (Providence Gold Mining Co. v. Marks, 74.)
7. SAME—MINES AND MINING—ADVERSE—LIMITATIONS—REVIEW—SCOPE—SEC. 2326, REV. STATS. U. S., CITED.—The statute, *supra*, provides that an action on an adverse must be brought within thirty days after the adverse claim is filed. An issue as to whether an action was brought within this time, when not raised in the lower court, cannot be reviewed when presented for the first time on appeal. (Providence Gold Mining Co. v. Marks, 74.)
8. APPEAL AND ERROR—ASSIGNMENT OF ERROR—MUST BE SPECIFIC—RULE 6, SUBD. 2, OF SUPREME COURT RULES CITED—MILLER v. DOUGLAS, ANTE, P. 41, 60 PAC. 722, FOLLOWED.—An assignment of error that the court erred in overruling a motion for a new trial is too general to be considered on appeal, subdivision 2 of supreme court rule 6 providing that "If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered as distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors." (Main v. Main, 149.)
9. SAME—SAME—SAME—MUST STATE FACT RELIED ON TO SHOW ERROR.—Assignments of error are of the nature of allegations in a complaint, and take the place in an appellate court of a complaint in a *visi prius* court. Each assignment of error must state some fact relied upon, and an assignment that the court erred in finding the issues for the defendants is too general. (Main v. Main, 149.)
10. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—WAIVER—LAWS OF ARIZ., ACT MARCH 18, 1897, CONSTRUED.—Where there is no assignment of errors in appellant's brief, and there is a failure to distinctly specify any ground of error, there is a failure to comply with the provisions of the statute, *supra*, providing that "the brief of the plaintiff in error or appellant . . . shall contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be

APPEAL AND ERROR (Continued).

- deemed to have been waived," and the judgment of the trial court will be affirmed. (*Utah Canal etc. Co. v. The London Company*, 1.)
11. **APPEAL AND ERROR—CONFLICT IN EVIDENCE—FINDINGS—WILL NOT BE DISTURBED.**—The appellate court will not disturb the findings of the trial court, where there was abundance of evidence to support the findings and it cannot be said that they are wrong. (*Johnson v. Cummings*, 60.)
 12. **APPEAL AND ERROR—EQUITY—REVIEW—SCOPE—DECISIVE ISSUES.**—On appeal in an equity case, the appellate court will only look into and review the determination by the lower court of those issues which are decisive of the interests and rights of the parties and controlling in the disposition of the case. (*Wiser v. Lawler*, 163.)
 13. **APPEAL AND ERROR—ASSIGNMENT OF ERROR—SUFFICIENCY.**—An assignment of error alleging that "the district court erred in decreeing that the plaintiffs are entitled to no relief in the case" is too general for consideration on appeal. (*Wiser v. Lawler*, 163.)
 14. **SAME—SAME—SAME.**—An assignment that "the court erred in refusing and rejecting findings of fact, and each of them, submitted by plaintiffs," referring to nineteen different findings submitted by plaintiffs, only eight of which are presented in the abstract of record furnished this court, is too general and indefinite for consideration upon appeal. (*Wiser v. Lawler*, 163.)
 15. **SAME—SAME—SAME.**—An assignment of error alleging that "the findings of the court are incomplete and erroneous," with no statement of specifications wherein the error or incompleteness consists, is too general to be considered on appeal. (*Wiser v. Lawler*, 163.)
 16. **APPEAL AND ERROR—CHINESE EXCLUSION ACT—DISCHARGE—NO APPEAL BY UNITED STATES—ACT OF CONGRESS SEPTEMBER 13, 1888, SEC. 13, 25 U. S. STATS. AT LARGE, 479, CONSTRUED.**—The United States has no right to appeal from an order made by a court commissioner discharging a Chinaman of the privileged class, the Chinese Exclusion Act (act of Congress, September 13, 1888, sec. 13) authorizing commissioners of United States courts to order the deportation of Chinese not of the privileged class, and giving such Chinese a right of appeal to the United States district court within ten days. (*United States v. Lee Ching Goon*, 2.)
 17. **APPEAL AND ERROR—CONTRACT—VERBAL—FOR COMMISSION—EVIDENCE—FINDINGS OF FACT—WILL NOT BE DISTURBED ON APPEAL IF ANY EVIDENCE TO SUPPORT—MAIN V. MAIN, ANTE, P. 149, 60 PAC. 888; JOHNSON V. CUMMINGS, ANTE, P. 60 PAC. 870; HENRY V. MAYER, 6 ARIZ. 103, 53 PAC. 590, FOLLOWED.**—In a suit on a verbal contract to recover commission for having negotiated a lease of certain property a finding that plaintiff is entitled to a commission of one third of the rent received will not be disturbed on appeal, there being some evidence to support it. (*Goldman v. Shultz*, 279.)

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18. **APPEAL AND ERROR—FINDINGS OF FACT—REVIEW—CONFLICTING EVIDENCE—**MCCORMACK v. ARIZONA CENTRAL BANK, 5 ARIZ. 278, 52 PAC. 469; HENRY v. MAYER, 6 ARIZ. 103, 53 PAC. 590, FOLLOWED.—Where a cause is tried to the court, and the court makes its findings of fact, such findings of fact will not be disturbed unless there is a substantial failure of the evidence to support the findings. (Miller v. Miller, 316.)
19. **APPEAL AND ERROR—JUDGMENT—GENERAL FINDING OF ISSUES WILL SUPPORT—WHEN—**DAGGS v. HOSKINS, 5 ARIZ. 300, 52 PAC. 357, FOLLOWED.—A general finding of the issues in favor of the defendants sufficiently supports a judgment, the decree being based upon defensive matter, and not affirmative matter pleaded in a cross-complaint. (Main v. Main, 149.)
20. **APPEAL AND ERROR—PERSONAL INJURIES—NEGLIGENCE—VERDICT—WILL NOT BE DISTURBED WHERE CONFLICT OF EVIDENCE—**ANDERSON v. TERRITORY, 6 ARIZ. 185, 56 PAC. 717—TERRITORY v. MIRAMONTEZ, 4 ARIZ. 179, 36 PAC. 35, FOLLOWED.—In an action to recover damages for injuries resulting in death through the negligence of defendant railroad company, the case turned upon the fact whether or not the statutory requirement, making it mandatory upon railroad corporations to cause a bell to be rung upon approaching a crossing for a distance of not less than eighty rods from the same was complied with. The verdict of the jury based upon contradictory testimony is that it was not, and this court is not at liberty to disregard the verdict upon a disputed question of fact where there is any evidence to support it. Cases, *supra*, followed. (Maricopa etc. R. R. Co. v. Dean, 104.)
21. **APPEAL AND ERROR—RECORD—CONTENTS—EVIDENCE—MUST BE INCORPORATED BEFORE ERRORS DEPENDENT THEREON WILL BE REVIEWED.**—On appeal the court will not review errors which involve a consideration of the facts disclosed by the evidence, unless the evidence is incorporated in the record. (Billups v. Utah Canal etc. Co., 211.)
22. **APPEAL AND ERROR—RECORD—MINUTE ENTRY OF EVIDENCE OFFERED NOT PART OF—**LAWS OF ARIZ. 1897, ACT NO. 71, SEC. 2, CONSTRUED.—Section 2 of act No. 71, *supra*, provides that when an appeal or writ of error is taken the clerk shall certify, among other things, all minute orders in the case. A recitation of what testimony was introduced is not a minute order within the meaning of the statute, and is not intended to take the place of a statement of facts or a transcript of the evidence provided for by section 1 of said act. (Myers v. Farmers and Merchants' Bank, 67.)
23. **SAME—SAME—EVIDENCE—SUFFICIENCY—ADMISSIBILITY.**—This court cannot review questions presented by assignments of error as to the admissibility and sufficiency where the only record is a minute entry of the clerk, stating that the plaintiff introduced certain evi-

APPEAL AND ERROR (Continued).

- dence, rested, and the cause was submitted; for even if it is to be considered as a part of the record, it does not show that defendants objected to the admission of such evidence or that other or further evidence was not introduced by plaintiff. (*Myers v. Farmers and Merchants' Bank*, 67.)
24. ~~SAME—SAME—BRIEFS—AGREED STATEMENT OF FACTS—MUST BE APPROVED BY TRIAL COURT.~~—The agreement of both appellee and appellants in their briefs as to the evidence does not afford grounds for review, as even an agreed statement of facts cannot become a part of the record of any cause on appeal, unless such agreed statement shall have first received the approval of the trial court. (*Myers v. Farmers and Merchants' Bank*, 67.)
25. ~~APPEAL AND ERROR—RECORD—MOTION FOR NEW TRIAL—PRESUMPTION—DENIED BY OPERATION OF STATUTE—WHEN—LAWS OF ARIZ.~~ 1891, ACT NO. 49, CITED.—Where the record is silent as to any action which the court might have taken on the motion for a new trial, it is proper to assume that it was not expressly ruled upon by the court, but was denied by operation of the statute, *supra*, providing that in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then such motion shall be deemed to have been denied. (*Svea Insurance Co. v. McFarland*, 131.)
26. ~~SAME—SAME—SAME—TIME FOR FILING—PAR. 836, REV. STATS. ARIZ.~~ 1887, HELD MANDATORY—*SPICER v. SIMMS*, 6 ARIZ. 347, 57 PAC. 610, CITED.—Where a motion for a new trial is not filed within two days after judgment, the district court is not required to hear and decide it, the statute, *supra*, providing that all motions for new trials shall be made within two days after the rendition of the verdict or judgment being mandatory. (*Svea Insurance Co. v. McFarland*, 131.)
27. ~~SAME—SAME—SAME—SAME—SPICER v. SIMMS, 6 ARIZ. 347, 57 PAC.~~ 610, CITED AND DISTINGUISHED.—While the court would not be required to hear and decide a motion for new trial, made more than two days after verdict and judgment, yet it has the power so to do at any time during the term at which judgment was rendered. (*Svea Insurance Co. v. McFarland*, 131.)
28. ~~SAME—SAME—SAME—SAME—HOW COMPUTED—SUNDAYS—PARS. 920,~~ REV. STATS. ARIZ. 1887, CONSTRUED.—An intermediate Sunday or holiday is included in computing the two days allowed for making motion for new trial under the statute, *supra*, providing that the time in which any act provided by law is to be done is to be computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded. (*Svea Insurance Co. v. McFarland*, 131.)
29. ~~SAME—SAME—SAME—NECESSITY FOR—REVIEW—SCOPE—PUTNAM v.~~ PUTNAM, 3 ARIZ. 182, 24 PAC. 320; *RICHARDS v. GREEN*, 3 ARIZ. 227,

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- 32 PAC. 266, FOLLOWED.—On appeal no alleged error will be reviewed which might have been good ground for a new trial in the court below, unless the same shall have been presented to such court by a motion for a new trial, and the motion overruled. (*Svea Insurance Co. v. McFarland*, 131.)
30. SAME—SAME—ASSIGNMENT OF ERRORS—BRIEF—WAIVER OF ERRORS—PAR. 940, REV. STATS. ARIZ. 1887, AND ACT NO. 71, LAWS OF ARIZ. 1897, CONSTRUED.—Paragraph 940 of the Revised Statutes of Arizona of 1887 required in all cases the appellant shall file with the clerk of the court below an assignment of errors. Act No. 71, Laws of Arizona of 1897, did not do away with the necessity of filing assignments of errors. Section 4 of act No. 71, *supra*, providing that it shall not be necessary to assign or file any assignment of errors in the court below or in the supreme court except those assigned in the brief of the appellant, but that the brief of the appellant shall contain an enumeration of the errors relied upon, and that all errors not assigned in the printed brief shall be deemed to have been waived, does not do away with the necessity of filing assignments of errors, as contemplated by paragraph 940, *supra*, and this court will not consider propositions argued in the briefs in the absence of an assignment of errors. (*Svea Insurance Co. v. McFarland*, 131.)
31. APPEAL AND ERROR—RECORD—VERDICT—ASSIGNMENTS OF ERROR—CONFLICT IN EVIDENCE.—Where in addition to the record failing to show that the appellant moved to have the verdict set aside as against the evidence it appears that neither the refusal of the trial court so to do nor to grant a new trial on the ground that the verdict was against the evidence is assigned as error, and that there is substantial evidence to support the verdict, although there is a conflict, the verdict of the jury will not be disturbed on appeal. (*Providence Gold Mining Co. v. Marks*, 74.)
32. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT—REFUSAL TO FIND EVIDENTIARY FACTS.—The refusal of the trial court to make findings relating merely to evidentiary facts will not be reviewed by this court on appeal. (*Wiser v. Lawler*, 163.)
33. APPEAL AND ERROR—REVIEW—MOTION FOR NEW TRIAL—NECESSITY FOR—ACT NO. 21, LAWS OF ARIZONA, 1893, CONSTRUED—PUTNAM V. PUTNAM, 3 ARIZ. 182, 24 PAC. 320; GREER V. RICHARDS, 3 ARIZ. 227, 32 PAC. 266; *SVEA INS. CO. V. MCFARLAND*, ANTE, P. 131, 60 PAC. 936, FOLLOWED.—Where the statute, *supra*, contemplates that errors occurring at the trial shall first be reviewed by the lower court upon motion for a new trial, it must be presumed that the court below would have granted a new trial if the rulings of the trial court in the admission and rejection of evidence had been urged as a ground for a new trial, and had constituted error; and there can be no review of alleged error which might have been good

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- ground for new trial, unless the same shall have been presented to such court by motion for a new trial. (*Newhall v. Porter*, 160.)
34. SAME—JUDGMENT—FINDINGS—GENERAL—VALIDITY OF JUDGMENT BASED UPON—ACT NO. 22, LAWS OF 1897, CITED—*DAGGS v. HOSKINS*, 5 ARIZ. 300, 52 PAC. 357; *MCGOWAN v. SULLIVAN*, 5 ARIZ. 334, 52 PAC. 986; *MAIN v. MAIN*, ANTE, P. 149, 60 PAC. 888, FOLLOWED.—A judgment based upon a general finding upon the issues in favor of the defendant is valid under act No. 22, *supra*. (*Newhall v. Porter*, 160.)
35. APPEAL AND ERROR—VERDICT—EVIDENCE—CONFLICT.—Where it is essential to plaintiff's recovery that he establish a partnership, and the evidence upon this point is meager, conflicting, and far from satisfactory, the trial court was justified in finding for the defendant upon the issue, and such finding will not be disturbed on appeal. (*Newhall v. Porter*, 160.)
36. APPEAL AND ERROR—SUPREME COURT—JURISDICTION—AMOUNT INVOLVED—RECOVERY—REV. STATS. ARIZ. 1887, PAR. 593, CITED.—Under the statute, *supra*, providing that the supreme court shall have jurisdiction to review upon appeal a judgment in an action or proceeding commenced in the district courts when the matter in dispute exceeds two hundred dollars, an appeal by the defendant from a judgment in favor of plaintiff for one hundred and thirty-four dollars, though suit was brought for three hundred and twenty-four dollars, will not lie, the defendant seeking no affirmative relief. (*Phoenix Wholesale Meat Co. v. Moss*, 274.)
37. SAME—SAME—SAME—SAME—TAXATION—PAYING INSPECTOR FOR TAGGING HIDES NOT—REV. STATS. ARIZ. 1887, PAR. 592, 593, AND LAWS ARIZ. 1897, ACT NO. 6, SEC. 39, CITED.—Paragraphs 592 and 593, *supra*, provide for appeal to the supreme court from a district court when the amount in controversy exceeds one hundred dollars, when the legality of any tax, toll, impost, or municipal fine is in question, or the amount in controversy exceeds two hundred dollars. Act No. 6, section 39, *supra*, makes it the duty of the inspector to inspect all animals slaughtered for sale in his district and place a tag on every hide so inspected, for which inspection the butcher must pay twenty-five cents a hide. An appeal will not lie on behalf of defendant from a judgment for one hundred and thirty-four dollars for inspections made, as the services required are intended for the protection both of the butcher and the public, and the fees cannot be considered either a tax, toll, impost, or municipal fine. (*Phoenix Wholesale Meat Co. v. Moss*, 274.)
38. APPEAL AND ERROR—TO SUPREME COURT—TRIAL DE NOVO.—The supreme court does not take cases from the district courts as those courts take cases appealed from the justices' courts, and try them *de novo*, but reviews the rulings of the district court when properly assigned as error and presented for revision. (*Maricopa Co. v. Jordan*, 4.)

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39. **SAME—ASSIGNMENT OF ERRORS—NECESSITY.**—Where on appeal no errors are assigned, and none appear on the face of the record, the judgment of the lower court will be affirmed. (*Maricopa County v. Jordan*, 4.)
40. **APPEAL AND ERROR—VERDICT—CONFLICT OF EVIDENCE—NEW TRIAL WILL NOT BE GRANTED.**—The appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence, when the testimony is conflicting, and there is any evidence to support the verdict. (*Goldman v. Sotelo*, 23.)
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APPEAL-BOND.

1. **APPEAL-BOND—IN FORCIBLE ENTRY AND DETAINER—JURISDICTIONAL—WHEN DEFECTIVE—PARS. 2021, 2022, REV. STATS. ARIZ. 1887, CITED.**—Where an appeal-bond in an action for forcible entry and detainer provided that appellant should prosecute said appeal to effect, and should fully pay off, satisfy, and perform the judgment which may be rendered against him on said appeal, said bond was defective because it limited the liability to three hundred dollars. Paragraph 2021, *supra*, provides that the condition of such an appeal-bond must be that the appellant shall prosecute his appeal with effect or pay all costs and damages which may be adjudged against him, and neither paragraphs 2021 nor 2022, *supra*, provides for a limitation of the amount of the liability. (*Territory of Arizona v. Doan*, 89.)
2. **SAME—DEFECTIVE—NEW BOND—CANNOT BE GIVEN AFTER TIME FOR TAKING APPEAL HAS EXPIRED—JURISDICTIONAL—PUTNAM V. PUTNAM, 2 ARIZ. 259, 24 PAC. 320; JOHNSTON V. LETSON, 3 ARIZ. 344, 29 PAC. 893; CROWLEY V. REILLY, 3 ARIZ. 286, 29 PAC. 14; McDONALD V. ELLIS, 4 ARIZ. 189, 36 PAC. 37, APPROVED.**—Where an appeal-bond is made jurisdictional, any substantial variation from the conditions of the bond required to be given defeats the jurisdiction of the appellate court, and no bond can be given such as to confer jurisdiction after the expiration of the time limited by statute for taking an appeal. (*Territory of Arizona v. Doan*, 89.)

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BANKRUPTCY.

1. **BANKRUPTCY—SEC. 4, BANKRUPTCY ACT 1898, CONSTRUED—INVOLUNTARY PETITION—CORPORATIONS—TRADING AND MERCANTILE.**—The statute, *supra*, provides that "Any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits . . . may be adjudged an involuntary bankrupt." *Held*, that a corporation organized to construct railroads, turnpikes, canals, dams, reservoirs, etc., and which had constructed a canal and tunnel, and the grade and roadbed of a railroad, and which only temporarily supplied its employees with food, clothes, and other supplies, was not principally engaged in mercantile or trading pursuits, so as to be declared a bankrupt under section 4, *supra*. (In re Minnesota etc. Construction Co., 137.)

2. **SAME—SAME—SAME—SAME—PAST TRANSACTIONS—BUSINESS AT TIME OF PROCEEDING CONCLUSIVE.**—The statute, *supra*, does not in any case apply to a corporation that has quit all buying and selling of merchandise, has no merchandise on hand, and does not owe any one for merchandise purchased, or in any way connected with its buying or selling of goods. The corporation to be adjudged a bankrupt must at the time of the filing of the petition be engaged in mercantile pursuits. (In re Minnesota etc. Construction Co., 137.)

BIAS.

Of juror, question of fact for court to decide. See Juror, 1.

See Juror, 3.

BILL OF SALE.

Of live-stock, validity of. See Live-Stock, 1.

BOARD OF EQUALIZATION.

Jurisdiction limited. See Taxes and Taxation, 1.

Jurisdiction, original, appellate. See Taxes and Taxation, 2.

Jurisdiction, presumption against when questioned. See Taxes and Taxation, 1.

BOARD OF SUPERVISORS.

1. BOARD OF SUPERVISORS—LIABILITY FOR MONEY WRONGFULLY PAID—GOOD FAITH—IMMATERIAL—PAR. 383, REV. STATS. ARIZ. 1887, AND ACT 34, APPROVED APRIL 3, 1893, AMENDING SAME, CONSTRUED.—Act 34 of the eighteenth legislature, approved April 3, 1893, amending paragraph 383 of the Revised Statutes of Arizona of 1887, provides that whenever any board of supervisors shall, without authority of law, order any money paid, for any purpose, such supervisors and the party or parties in whose favor such order shall have been made shall be responsible for all such sums of money and twenty per cent additional thereon. Suit having been brought under this act against a board of supervisors to recover money wrongfully ordered paid by them, *held*, that the board of supervisors make all orders for payments of money at their peril, and are liable for money paid without authority of law, though they act in perfect good faith, believing that they were authorized to make such order. (*Avery v. Pima County*, 26.)

Action against for money unlawfully paid. See Evidence, 6.

Duty of, in regard to incorporating municipality. See Constitutional Law, 3.

Members liable for unlawful payment of salary. See Counties, 1.

BONA FIDE RESIDENCE.

What constitutes. See Public Lands, 3.

BONDS.

1. BONDS—COUNTY—FUNDING—TERRITORIAL ACT, MARCH 19, 1891, CONSTRUED—BEAVIN V. MAYOR, 6 ARIZ. 212, 56 PAC. 719, AND YAVAPAI COUNTY V. MCCORD, 6 ARIZ. 423, 59 PAC. 99, FOLLOWED.—Under the territorial act of March 19, 1891, providing that "any person holding bonds, warrants, or other evidence of indebtedness of the territory or any county, municipality, or school district within the territory . . . may exchange the same for the bonds issued under the provisions of this act," it was the duty of the commissioners to fund the outstanding indebtedness of the county upon a demand from the holders, although no such demand was made by the county board of supervisors. (*Schuerman v. Territory of Arizona*, 62.)
2. SAME—SAME—SAME—LOAN COMMISSIONERS—POWERS OF—ACT OF CONGRESS, JUNE 6, 1896, CONSTRUED—GAGE V. MCCORD, 5 ARIZ. 227, YAVAPAI COUNTY V. MCCORD, 6 ARIZ. 423, 59 PAC. 99, FOLLOWED.—The limit of January 1, 1897, mentioned in the act of Congress of June 6, 1896, authorizing the funding of all obligations outstanding, was intended to be restrictive only of the indebtedness which could be funded, and made the act applicable to that time, but did not terminate on that date the authority of the territorial officers to fund said obligation. (*Schuerman v. Territory of Arizona*, 62.)

BONDS (Continued).

3. ~~SAME—SAME—SAME—SAME—JOINT AUTHORITY—AUTHORITY OF MAJORITY—~~PAR. 2932, SUBD. 2, AND TITLE 31, REV. STATS. ARIZ. 1887, AS AMENDED BY ACT OF CONGRESS, JUNE 25, 1890, CONSTRUED.—Under subdivision 2 of paragraph 2932, *supra*, providing that "All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons, unless it shall be otherwise expressly declared in the law giving the authority," the funding of bonds by the board of loan commissioners at a meeting of such board at which only two members of such board were present, the third being out of the territory, was valid, the Funding Act of 1887, as amended by Congress in 1890, being a territorial act and directly affected by subdivision 2 of paragraph 2932, *supra*. (*Schuerman v. Territory of Arizona*, 62.)
4. BONDS—STATUTORY—COMMON LAW—VALIDITY—CONTESTED ELECTION—PARS. 1732, 1750, 3065, REV. STATS. ARIZ. 1887, CONSTRUED.—Pending an appeal in a contest to determine who was elected city marshal, defendant gave a bond to refund any salary paid him by the city if declared not entitled to the office. Paragraph 1732, *supra*, provides for contests of elections, and paragraph 1750, *supra*, makes provision for such a bond, except that it uses the word "county," and does not in specific terms extend to any other political subdivision. Defendants set up no defense to the bond other than that it was without legal authority. *Held*, that as under paragraph 3065, *supra*, the defendant could not have received money for his services as city marshal from the city pending the appeal, unless he made a contract protecting the city in the payment of such salary, the bond was valid even though not a statutory bond, and he and his sureties were responsible thereon. (*Finley v. City of Tucson*, 108.)
5. ~~SAME—~~TO REFUND SALARY—MEASURE OF LIABILITY.—Defendant executed a bond conditioned to refund the salary paid to him as city marshal by the city pending an appeal, provided he was declared not entitled to the office. *Held*, that the terms of the bond are controlling, and all salary must be refunded, and not merely any damages which the city might have suffered. (*Finley v. City of Tucson*, 108.)
 Appeal. See Appeal-Bond, 1, 2.
 New. See Appeal-Bond, 1, 2.
 See Certiorari, 2.

BRIEF.

Errors assigned in, will not be considered unless contained in assignment of errors. See Appeal and Error, 30.
 Must contain enumeration of errors relied on, or they will be deemed waived. See Appeal and Error, 5.

BROKERS.

1. **BROKERS — COMMISSION — FORECLOSURE — AMOUNT BID AT SALE — MEASURE OF COMMISSION — RENTAL.**—Plaintiff negotiated the lease of lands belonging to Wormser, under a verbal contract, providing that he was to receive as his commission one third of the rent per annum. The lessees being \$17,500 in default for rent, defendant foreclosed his landlord's lien on a growing crop on the premises for the arrears in rent, and purchased it at foreclosure sale for one thousand dollars. Subsequently defendant sold the crop for \$12,500. Plaintiff brought suit to recover one third of this \$12,500 paid defendant, claiming that it was part of the balance due on the rent. *Held*, that as the foreclosure sale was made under a judgment against the lessee for the unpaid rental, the one thousand dollars paid should be credited upon the judgment against the lessee for rent, and to that extent was a payment of rent, and plaintiff was entitled to one third of that amount, but that upon the sale the defendant became the absolute owner of the crop, and plaintiff had no further interest therein. (*Goldman v. Shultz*, 279.)

BURDEN OF PROOF.

As to contributory negligence is on defendant. See *Personal Injuries*, 1.
Instructions on. See *Criminal Law*, 8.

BURGLARY.

Defined. See *Criminal Law*, 1.
Degrees. See *Criminal Law*, 1.
No presumption of guilt from recent possession of stolen goods. See *Criminal Law*, 2.
See *Criminal Law*, 1, 2, 3, 4.

CANAL COMPANIES. See *Water and Water-Rights*, 1, 2, 23, 25, 27, 28, 29, 30, 31.

CERTIFICATE.

Of registration of marks and brands, evidence of ownership of brand but not of cattle. See *Live-Stock*, 1.

CERTIORARI.

1. **CERTIORARI—SUPERSEDEAS—SUBSEQUENT ACTION VOID.**—Inasmuch as a writ of *certiorari* takes effect as a *supersedeas* upon its being delivered to the officer or board to whom it is directed, rendering all subsequent proceedings before him or it *coram non judice* and void, any attempted action of a board of equalization to increase an assessment sought to be reviewed after a writ of *certiorari* was issued to said board, commanding it to desist from further proceedings in relation to increase of such assessment, was void. (*Cop-*

CERTIORARI (Continued).

per Queen Consolidated Mining Company v. Board of Equalization of Cochise County, 364.)

2. **CERTIORARI—WHEN PROPER REMEDY—FORCEFUL ENTRY AND DETAINEE—BOND ON APPEAL—JURISDICTION—PARS. 134, 2026, REV. STATS. ARIZ., CONSTRUED.**—A writ of *certiorari* may be issued as provided by the Revised Statutes of Arizona of 1887 (par. 134) when an inferior court has exceeded its jurisdiction, and there is no appeal, nor any speedy and adequate remedy. In forcible entry and detainer cases paragraph 2026 of the Revised Statutes of Arizona of 1887 limits an appeal from the district court to cases where the damages awarded exceed one hundred dollars. On appeal from a decision of a justice in a case of forcible entry and detainer defendant gave a jurisdictionally defective bond, and the district court overruled the plaintiff's motion to dismiss appeal for want of a proper bond. It appearing that no damages could be awarded against the plaintiff, *certiorari* is the proper remedy to test the question of the jurisdiction of the district court. (Territory of Arizona v. Doan, 89.)

CHARGE TO JURY. See Instructions to Jury

CHINESE EXCLUSION ACT.

No right of appeal in United States under, where Chinese discharged by commissioner. See Appeal and Error, 16.

CLAIMS.

Action on, limitation. See Executors and Administrators, 2.
Presentation to and rejection by executor or administrator. See Executors and Administrators, 1.
Presumed to have been disapproved or neglected, and not to have been approved. See Executors and Administrators, 1.

CLASSIFICATION.

Of counties. See Constitutional Law, 4.

COLLATERAL ATTACK.

On judgment. See Judgment, 1.

COMMISSION.

Measure of. See Brokers, 1.
See Appeal and Error, 17.

COMMUNITY PROPERTY.

Conveyance of, by husband to wife makes it separate. See Husband and Wife, 1.

CONFLICT IN EVIDENCE.

Findings will not be disturbed where existing. See Appeal and Error, 11.

New Trial will not be granted where existing. See Appeal and Error, 40.

Verdict will not be disturbed where existing. See Appeal and Error, 20, 31, 35.

See Appeal and Error, 31, 40.

CONGRESS.

Legislative authority of. See Legislative Authority, 1.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—COURTS—DUTY—TO APPLY AND ENFORCE LAW—IF CONSTITUTIONAL, OPPRESSIVENESS IS IMMATERIAL.—When an act is plain and unmistakable in its language, and is free from objection on constitutional grounds, the courts are bound to apply and enforce it, however unjust, oppressive, or objectionable in policy it may be. (*Avery v. Pima County*, 26.)

2. CONSTITUTIONAL LAW—MUNICIPALITIES—INCORPORATION OF—NOT A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW—NOTICE—UNNECESSARY—ACT OF APRIL 12, 1893, ACT NO. 72, HELD NOT IN CONFLICT WITH ACT CONG. JULY 30, 1886, HARRISON ACT.—The incorporation of a municipal body has never been regarded as imposing taxes upon people, in the sense of taking property for a public use or taking property without due process of law, if all parties were not notified by publication or otherwise. The statute, *supra*, providing for the incorporation of towns, violates no provision of the constitution of the United States or the act of Congress, *supra*, in not providing for notice to the parties interested. (*Territory of Arizona v. Town of Jerome*, 320.)

3. SAME—SAME—SAME—PORTION OF A COMMUNITY MAY INCORPORATE—DUTY OF BOARD OF SUPERVISORS—ACT NO. 72, LAWS 1893, CONSTRUED.—The act, *supra*, providing that whenever two thirds of the taxable inhabitants of any town shall petition the supervisors of the county for the incorporation of the town, setting forth the metes and bounds of the same, the board may order such town incorporated, only required that the board of supervisors shall ascertain whether the petitioners live within the territory described in the petition by metes and bounds, and whether they constitute two thirds of the taxable inhabitants within such metes and bounds; and if two thirds of the taxable inhabitants living within the area described in the petition join in such petition, it is immaterial whether or not such area comprises the whole town. (*Territory of Arizona v. Town of Jerome*, 320.)

4. CONSTITUTIONAL LAW—SPECIAL AND LOCAL LAWS—CLASSIFICATION OF COUNTIES—ACT NO. 63, 1899, LAWS OF ARIZONA, NOT IN CON-

CONSTITUTIONAL LAW (Continued).

FLICT WITH "HARRISON ACT," 1 SUPP. REV. STATS. U. S., P. 503.—Act No. 63, 1899, applying to counties of first and second class, the classification being based upon the equalized assessed valuation of the property, is not local or special so as to be in conflict with the provisions of the "Harrison Act," 1 Supp. Rev. Stats. U. S., p. 503; Organic Law of Arizona, Rev. Stats. Ariz., 1901, par. 63. (Harwood v. Perrin, 114.)

See Legislative Authority, 1.

CONTINUANCE.

Affidavits for, may be met with counter affidavits by prosecution.

See Criminal Law, 5.

Granting of, discretionary. See Criminal Law, 6.

CONTRACTS.

1. **CONTRACTS—EXECUTION—EVIDENCE—FAILURE OF PROOF.**—The plaintiffs, husband and wife, owners of a sawmill, sued upon a contract, alleged to have been entered into with defendant corporation, for moving their mill and sawing lumber for defendant. The husband had a conversation with F., and a contract drawn up was signed by him, but never by his wife. There was no evidence that F., who was organizing defendant company, ever signed the contract, nor did the evidence show that defendant corporation was in existence at the time the alleged contract was entered into. *Held*, there was no substantial proof of a contract between plaintiffs or either of them and the Providence Gold Mining Company to sustain a verdict for damages for its breach. (Providence Gold Mining Company v. Thompson, 69.)
2. **SAME—INSTRUCTIONS TO JURY—DAMAGES—FUTURE PROFITS.**—It is not error for the court to refuse to instruct the jury that the plaintiffs had failed to show any actual damage, and the evidence as to damages resulting from loss of profits was so vague and uncertain, and dependent upon so many conditions and contingencies, that plaintiffs were not entitled to recover, where the plaintiffs had introduced some evidence of probable or future profits. (Providence Gold Mining Company v. Thompson, 69.)
3. **CONTRACTS—SUITS BY OR AGAINST ADMINISTRATORS, ETC.—WITNESSES—COMPETENCY—PAR. 1865, REV. STATS. ARIZ. 1887, CONSTRUED.**—The statute, *supra*, provides that "In an action by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court." *Held*, that this statute leaves the competency of either party's testimony regarding such transaction to the sound discretion

CONTRACTS (Continued.)

of the court, and no abuse of discretion is apparent in allowing plaintiff to testify to an oral contract with defendant's decedent when two other witnesses testified to the same facts. (*Goldman v. Sotelo*, 23.)

Proper parties to make, in relation to maintenance of United States prisoners in county jails. See *United States prisoners*, 1. See *Appeal and Error*, 17; *Mines and Mining*, 1; *Water and Water-Rights*, 7.

CONTRIBUTORY NEGLIGENCE. See *Personal Injuries*, 1, 2.

CORPORATIONS.

Entitled to make appropriation of water, (See *Water and Water-Rights*, 14) but not unless owner or possessor of arable and irrigable land. See *Water and Water-Rights*, 16.

Liable to cestui que trust where it transfers property to trustee with notice of fraud. See *Trusts*, 3.

Trading and mercantile, what are within purview of Bankruptcy Act. See *Bankruptcy*, 1, 2.

COSTS.

1. **COSTS—LARGELY DISCRETIONARY WITH THE TRIAL COURT—COURT REPORTER'S PER DIEM—RULES OF COURT—PRESUMPTIONS—REGULARITY OF PROCEEDINGS—PARS. 895, 896, 902, 912, REV. STATS. ARIZ. 1887, CITED.**—The statutes, *supra*, leave the determination and disposition of the costs largely in the discretion of the trial court. The rules of the trial court relative to the per diem of the court reporter not being incorporated in the record, and the record showing that the court refused on motion to strike out an item in the cost-bill for the compensation of the court reporter, the presumption in favor of the regularity of procedure must prevail, and it will be assumed that the trial court acted in accordance with its rules. (*Billups v. Utah Canal etc. Co.*, 211.)

COUNTIES.

1. **COUNTIES—OFFICE AND OFFICERS—BOARD OF SUPERVISORS—MEMBERS LIABLE FOR UNLAWFUL PAYMENT OF SALARY—PROBATE JUDGE—SALARY—FEES—DUTY TO COLLECT AND TURN OVER TO COUNTY—REV. STATS. ARIZ. 1887, PAR. 409, PAR. 1987 AS AMENDED BY LAWS 1889, ACT NO. 53, PAR. 428, AND PAR. 384, AS AMENDED BY LAWS 1893, ACT NO. 34, CONSTRUED—AVERY v. PIMA COUNTY, ANTE, P. 26, 60 PAC. 702, FOLLOWED.**—Paragraph 409 *supra*, prohibits the county board of supervisors from allowing any demand against the county treasury, in favor of any person indebted to the county, without first deducting such indebtedness. Act No. 53, *supra*, limits the compensation of probate judge to a fixed salary. Paragraph 428, *supra*, requires that all fees shall be collected in ad-

COUNTIES (Continued.)

vance and paid into the county treasury. Act No. 34, *supra*, makes the supervisors and party in whose favor the order is drawn responsible for all money unlawfully paid out of the county treasury for salaries on orders drawn by said board. *Held*, following *Avery v. Pima County, ante*, p. 26, 60 Pac. 702, that an action was properly brought against the board of supervisors and the assignee of a probate judge to recover salary paid to such assignee of said judge, the judge having failed to collect fees connected with his office and to turn over those collected, and being at the time of payment indebted to the county. (*Schumacher v. Pima County*, 269.)

Classification of. See Constitutional Law, 1.

See Evidence, 6.

COUNTY BONDS.

1. COUNTY BONDS—REFUNDING—GOOD FAITH—RAILROAD CONSTRUCTION—MANDAMUS—LAWS ARIZ., ACT FEB. 21, 1883, ACTS CONG., JUNE 25, 1890, AND JUNE 26, 1896, CITED AND CONSTRUED.—The Territorial Act of February 21, 1883, *supra*, authorized Pima County to issue bonds in the amount of two hundred thousand dollars, to be exchanged for bonds of a railroad, thereafter to be constructed, in the following manner: Fifty thousand dollars when the company was organized, and a like amount "so often as each five miles of said railroad shall have been graded, laid with ties and iron," the proof the work having been performed to be the certificate of the county surveyor. The company was organized and ten miles of the road graded and laid with ties and iron, and one hundred and fifty thousand dollars in bonds were issued to the company according to the terms of the act. Work on the road was thereafter abandoned, the road was never completed, nor was any payment either of interest or principal made by the county upon the bonds. The act of Congress of June 6, 1896, *supra*, having provided that all outstanding bonds of the territory and counties thereof which had been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized should be funded in accordance with the act of Congress of June 25, 1890, creating a board of loan commissioners, whose duty it was to provide for the redeeming and refunding of the territorial or county indebtedness by the issuance of bonds therefor, and *mandamus* being brought to compel the loan commissioners to fund the bonds of Pima County issued to the railroad company: *Held*, that the exchange of bonds was not rendered fraudulent by the fact that the railroad had not been completed, the issuance and payment not being dependent upon completion, and that the bonds should therefore be funded. (*Utter v. Franklin*, 300.)

COUNTY WARRANT. See Evidence, 4.

COURT REPORTER'S PER DIEM. See Costs, 1.

COURTS.

1. COURTS—JUDGMENTS—VACATION—POWER — NONE AFTER EXPIRATION OF TERM.—A court has no power to set aside or vacate its own judgment after the expiration of the term at which the judgment was rendered. (*In re Guardianship of Zeckendorf*, 328.)

Bound to give effect to law, if constitutional, notwithstanding it may be oppressive and unjust. See Constitutional Law, 1.

CRIMINAL LAW.

1. CRIMINAL LAW—BURGLARY—DEFINED—DEGREES—NIGHT-TIME — DEFINED—EVIDENCE—REVIEWED AND HELD SUFFICIENT TO CONVICT OF BURGLARY IN FIRST DEGREE—REV. STATS. ARIZ. 1887, PARS. 713, 715, 717, CITED.—Paragraph 713, *supra*, provides that "every person who enters any . . . store . . . with intent to commit grand or petit larceny, or any felony, is guilty of burglary." Paragraph 715, *supra*, provides that "Every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the day-time is burglary of the second degree." Paragraph 717, *supra*, provides that "The phrase 'night-time,' as used in this chapter, means the period between sunset and sunrise." The owner of a store testified that when he closed on the night of January 10th he noticed nothing wrong; that he was called and told of the burglary between 7 and 7:30 o'clock in the morning of January 11th. Sunrise occurred at 7:04 on the morning of January 11th. The evidence showed that the cellar door was broken open, a hole cut through the floor, the storeroom broken into, the safe blown open, and its contents methodically rifled and the escape of the burglar. *Held*, that there was sufficient evidence from which the jury could rightfully infer that the burglary was committed in the night-time. (*Taylor v. Territory of Arizona*, 234.)
2. SAME — SAME — LARCENY—EVIDENCE—PRESUMPTIONS—RECENT POSSESSION OF STOLEN GOODS — INNOCENCE PRESUMED UNTIL GUILT PROVEN—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 1645, CITED—*TERRITORY V. CASIO*, 1 ARIZ. 485, 2 PAC. 755, EXPRESSLY OVERRULED.—The possession of stolen goods by the accused recently after a burglary or larceny, if unexplained, is a circumstance from which the jury may infer complicity therein, but the law raises no presumption from that or any other fact against a defendant, expressly declaring in the statute, *supra*, that "a defendant . . . is presumed to be innocent until the contrary be proved, and in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted." *Territory v. Casio*, *supra*, is expressly overruled. (*Taylor v. Territory of Arizona*, 234.)
3. SAME—SAME—CHARGE TO JURY—STATING A LEGAL PRINCIPLE IN THE ABSTRACT APPLICABLE TO THE EVIDENCE IN THE CASE NOT ERROR—NOR AN ASSUMPTION OF THE EXISTENCE OF FACTS.—A charge that

CRIMINAL LAW (Continued).

"where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual or exclusive possession of a person who gives a false account, or who refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct is evidence tending to prove not only that he stole the goods, but that he made use of the means by which access to them was obtained," does not assume the existence of certain facts as proven,—viz., that the defendant gave a false account, or refused to give any account, of the manner in which the checks came into his possession, and that his conduct was guilty at the time he was found with them in his possession,—as it only states a legal principle in the abstract, applicable to the evidence in the case, and hence is not objectionable. (*Taylor v. Territory of Arizona*, 234.)

4. SAME—SAME—LARCENY—EVIDENCE—FACTS TENDING TO PROVE LARCENY TEND TO PROVE BURGLARY, WHERE LARCENY COMMITTED IN CONNECTION WITH BURGLARY—CHARGE TO JURY—EXPRESSION OF OPINION BY COURT—WHAT IS NOT.—A larceny having been committed in connection with a burglary, testimony which tends to prove the larceny also tends to prove the commission of the burglary. It is not trenching upon the province of the jury to say that particular evidence tends to prove a matter which it clearly does tend to establish. Such an instruction is not an expression of opinion as to the weight or effect of the evidence, nor that any fact has been proved thereby. (*Taylor v. Territory of Arizona*, 234.)

5. CRIMINAL LAW—CONTINUANCE—AFFIDAVITS—COUNTER AFFIDAVITS.—Where defendants filed affidavits for a continuance on the ground that an absent witness, if present at the trial, would testify that deceased had threatened during a quarrel to take defendant's life, and that the whereabouts of said witness was unknown, but that defendant believed that said witness could be secured at a subsequent term of court if such continuance were granted, it was not error to permit the filing of counter affidavits by the prosecution tending to show that the witness had left the neighborhood prior to the quarrel, had never returned, and could not have heard the threats. (*Halderman v. Territory of Arizona*, 120.)

6. SAME—SAME—GRANTING OF—DISCRETIONARY.—The granting of a continuance for the purpose of securing the attendance of absent witnesses rests in the sound discretion of the court, and a denial would be justifiable if there was no showing made that the attendance of the witness could be procured at any subsequent date to which the trial could be postponed, or if, from counter affidavits, there was no good reason for believing that the witness would, if present, testify to the facts set forth in the affidavits for continuance. (*Halderman v. Territory of Arizona*, 120.)

CRIMINAL LAW (Continued).

7. **SAME—MURDER—EYE-WITNESS—PROSECUTION NOT BOUND TO SUMMONS.**—It is not error for the court upon a murder trial to refuse to compel the prosecution to call an eye-witness of the killing, as it is in the province of the prosecuting officer, and not of the court, to determine what witnesses shall be called in support of the charge against the defendant. (*Halderman v. Territory of Arizona*, 120.)
8. **SAME—SAME—INSTRUCTIONS TO JURY—BURDEN OF PROOF—PAR. 1655, PEN. CODE, REV. STATS. ARIZ. 1887, CITED—FOSTER v. TERRITORY, 6 ARIZ. 240, 56 PAC. 738, FOLLOWED.**—The statute, *supra*, provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." *Held*, an instruction given in the exact language of this section was not error. (*Halderman v. Territory of Arizona*, 120.)
9. **SAME—SAME—SAME—PAR. 1655, PEN. CODE, REV. STATS. ARIZ. 1887.**—The instruction that "where it is shown that a homicide has been committed with a deadly weapon, and no circumstance of mitigation, justification, or excuse appear, the law implies malice. The malice thus implied is that malice aforethought which is necessary to sustain an indictment for murder," states in different language the substance of paragraph 1655, *supra*, and aside from the statute is amply sustained by the authorities. (*Halderman v. Territory of Arizona*, 120.)
10. **SAME—SAME—SAME—DEFENDANT A WITNESS—CREDIBILITY.**—It is not error for the court to give an instruction which in general terms advises the jury that in determining the credibility of the defendant as a witness they are at liberty to take into consideration the fact of his interest in the result of his trial, and in which there is no animadversion upon the testimony which he has given in the case. (*Halderman v. Territory of Arizona*, 120.)
11. **SAME—SAME—SAME—STATUTORY DEFINITIONS SUFFICIENT.**—Where the court defined murder in the language of the statute, and gave the statutory definition of malice, it is not incumbent upon the court to supplement the statutory definition with one of his own, unless, perhaps, the defendant requests it and proffers an adequate and proper definition. (*Halderman v. Territory of Arizona*, 120.)
12. **CRIMINAL LAW—EMBEZZLEMENT—INDICTMENT—SUFFICIENCY—PARS. 675, 1457, 1459, 1467, PEN. CODE, REV. STATS. ARIZ. 1887, CITED AND CONSTRUED.**—Under paragraph 675 of the Penal Code, *supra*, making every officer of a county charged with the receipt, safe-keeping, transfer, or disbursement of public money, who without

CRIMINAL LAW (Continued).

- authority of law appropriates the same to his own use, punishable by imprisonment, an indictment charging that defendant was "an officer of said county of Pinal,—to wit, county treasurer, . . . and by virtue of his said office, then and there by law was charged with the receipt, safe-keeping, and disbursement of the public moneys . . . and acting in such office . . . did . . . willfully, feloniously, and without authority of law appropriate to his own use a part of the moneys intrusted to him as aforesaid," tested by the requirements of paragraphs 1457, 1459, and 1467 of the Penal Code, *supra*, is sufficient in form, and states facts to constitute a public offense,—to wit, receipt by an officer of public moneys and appropriation of said public moneys to his own use without authority of law. (Brady v. Territory of Arizona, 12.)
13. **SAME—INDICTMENT—COUNTY—NAME—SUFFICIENCY.**—An indictment is sufficient which designates a county as the "County of Pinal," there being no express provision of the statute that the name shall be "Pinal County," and both being used interchangeably in both the Civil and Penal codes. (Brady v. Territory of Arizona, 12.)
14. **SAME—SAME.**—Where the statute gives no name to the offense it is immaterial whether or not the pleader has aptly named it. (Brady v. Territory of Arizona, 12.)
15. **CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION—SCOPE—IMPEACHMENT.**—In a prosecution for assault with intent to commit murder a witness for the defense testified that she was present when the quarrel began; that she became frightened and ran out of the room; that there was then a noise like the report of a gun, and then a pistol-shot, but that she did not see defendant have a gun. *Held*, that it was proper to allow the district attorney to ask in cross-examination whether she did not say when she ran into an adjoining place, "Tamborino has shot the butcher," and questions of similar import, as it is proper to bring out everything said by a witness about the transaction, either at the time it happened or afterwards, inconsistent with or tending to contradict her evidence. (Tamborino v. Territory of Arizona, 194.)
16. **SAME—SAME—IMPEACHMENT—WHAT STATEMENTS MAY BE.**—Proof of contradictory statements upon a material point made by a witness may be introduced in evidence to impeach the witness after he has answered that he does not remember whether he made the contradictory statements or not. He cannot by answering that he has no recollection of having made the former statements imputed to him defeat the right of the impeaching party to prove that he did make such statements. (Tamborino v. Territory of Arizona, 194.)
17. **CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION—SCOPE—IMPEACHMENT.**—On a prosecution for assault with intent to commit murder, a witness having testified to her presence at the affray, and

CRIMINAL LAW (Continued).

as to what she saw and heard, it was proper to ask her on cross-examination if she had not made other statements about the matter, and, if she denied that she had, to show by other witnesses the statements she did make. (*Tamborino v. Territory of Arizona*, 246.)

18. **CRIMINAL LAW—EVIDENCE—DEFENDANT AS WITNESS—CROSS-EXAMINATION OF—EXTENT AND LIMITATION—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 2040, CONSTRUED.**—Where the statute, *supra*, provides that "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the territory as to all matters about which he was examined in chief," it is error to compel a defendant who has testified in his own behalf concerning the circumstances of the killing and in relation to his movements immediately before and after the homicide to answer on cross-examination as to whether or not he had been previously convicted of other felonies. (*Lewis v. Territory of Arizona*, 52.)

19. **CRIMINAL LAW—HOMICIDE—CHARGE TO THE JURY—MALICE AFORETHOUGHT.**—An instruction that "If the deceased was unlawfully, feloniously and unjustifiably shot and killed by the defendant, as charged in the indictment; that the killing was the result of malice suddenly produced at the time the fatal shot was fired, and was without premeditation or deliberation, then it is your duty to find the defendant guilty of murder in the second degree," is not bad as omitting the essential element in murder,—to wit, malice aforethought,—since in order to find defendant guilty under this charge the jury must find the killing to be the result of malice, and malice, the cause, must of necessity precede the killing, the result. (*Morgan v. Territory of Arizona*, 224.)

20. **SAME—BURDEN OF PROOF—INSTRUCTIONS AS TO PROPERLY REFUSED WHERE COURT FULLY CHARGED ON THE SUBJECT.**—It is not error to deny requests for charges on behalf of defendant pertaining to the burden of proof and the degree of proof necessary to establish the guilt of defendant so as to warrant a conviction, where an examination of the charge given by the court discloses no omission to charge the law fully upon the point. (*Morgan v. Territory of Arizona*, 224.)

21. **SAME—HOMICIDE—SELF-DEFENSE—CHARGE TO JURY—BODILY INJURY OR LOSS OF LIFE—REASONABLE BELIEF AS TO EXISTENCE OF—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 285, 286, CONSTRUED.**—A charge that one of the conditions under the right of self-defense which may be asserted is, "that the killing of the other was necessary in order to prevent the infliction upon himself of great bodily injury or loss of his life" is erroneous, in that it does not recognize a reasonable ground for the belief that the killing is necessary

CRIMINAL LAW (Continued).

on the part of defendant sufficient to excite the fears of a reasonable person as provided in the statutes, *supra*, defining the right of self-defense. (Morgan v. Territory of Arizona, 224.)

22. ~~SAME—SAME—SAME—SAME—SAME—SAME.~~—Upon a trial for homicide the defense was that of justifiable homicide, upon the ground that the defendant's life was in danger, and the killing of the deceased was necessary for his self-protection. The charge, in effect, stating that the defendant was justified in acting on appearances and belief, if the actual necessity existed of killing the deceased in order to prevent great bodily injury to himself, is an imperfect statement of the law of self-defense, as contained in the statutes, *supra*, in that the seeming necessity arising from circumstances sufficient to excite the fears of a reasonable person that the deceased was about to do him some great bodily injury, and that there was imminent danger of such design being accomplished, as a justification, is not made clear and definite. (Morgan v. Territory of Arizona, 224.)
23. ~~SAME—SAME—SAME—INSTRUCTIONS TO JURY—REASONABLE GROUND TO BELIEVE THAT DANGER OF GREAT BODILY INJURY OR LOSS OF LIFE EXISTED—REFUSAL TO GIVE—ERROR WHERE NOT PROPERLY COVERED IN GENERAL CHARGE.~~—Defendant, on trial for murder, and claiming self-defense as a justification, requested the following charge: "If the defendant, in the position in which he was then placed, and with the light and knowledge which he then had upon the subject, had reasonable ground to believe that the deceased intended to kill him or do him some great bodily injury; and if the circumstances as they came to his knowledge at that time, were sufficient to excite the fears of a reasonable person, that the deceased was about to murder any person, or to commit a felony, or to do him a great bodily injury, and the danger thereof was imminent, and if, acting upon these fears, the defendant killed the deceased to protect himself therefrom, then such killing, under such circumstances, was justifiable." *Held*, that the refusal to give this request, or to give a similar charge, the matter not being properly covered by the general charge, was error. (Morgan v. Territory of Arizona, 224.)
24. CRIMINAL LAW—MURDER—LESSER OFFENSES INCLUDED—CHARGE TO JURY—INSTRUCTIONS—FAILURE TO REQUEST—NOT ERROR TO OMIT—REV. STATS. ARIZ. 1887, PEN. CODE, PARS. 1643, 1677, 1678, 1679. CONSTRUED—CHUNG SING V. UNITED STATES, 4 ARIZ. 217, 36 PAC. 205; TERRITORY V. WEST, 4 ARIZ. 212, 36 PAC. 207.—The Revised Statutes of Arizona, *supra*, provides: "The judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party." Paragraphs 1677 and 1678, *supra*, permit either party to ask special instructions and prescribe the manner in which the same shall be settled. Paragraph 1679, *supra*, provides: "The court, in addition to the instructions provided

CRIMINAL LAW (Continued).

for in the two preceding sections, shall, in charging the jury, state to them all such matters of law as it may think necessary for their information in giving their verdict." Upon a trial for murder there is no legal obligation upon the court to give instructions upon the several lesser grades of the offense, in the absence of a request, though there was evidence thereof. (Ward v. Territory of Arizona, 241.)

25. CRIMINAL LAW—MURDER IN SECOND DEGREE—VERDICT—DEGREE MIS-
SPELLED "DEGREE"—DOES NOT VITIATE VERDICT—DOCTRINE *IDEM*
SONANS APPLICABLE.—A verdict finding the defendant "guilty of
murder in the second decree" is not void because it finds the appel-
lant guilty of no offense known to the statute, as the words
"decree" and "degree" are pronounced so nearly alike as to make
the doctrine of *idem sonans* applicable, and the spelling does not
render it uncertain. (Wilson v. Territory of Arizona, 47.)
26. SAME—SELF-DEFENSE—INSTRUCTION TO JURY—HARMLESS ERROR—
NOT GROUND FOR REVERSAL.—While an instruction that "To justify
the killing of another in self-defense, it must appear that the dan-
ger was so urgent and pressing that in order to save his own life, or
to prevent his receiving great bodily harm, the killing of the other
was absolutely necessary," may be erroneous, such error is harmless,
and no ground for reversal when a later statement to the jury that
"It is your duty to look to the transaction from what you believe
from the evidence was the standpoint of the defendant at the time,
and consider the same in the light of the facts and circumstances
as you believe they appeared to the defendant at the time, and not
from any other standpoint." (Wilson v. Territory of Arizona, 47.)
27. CRIMINAL LAW—PUBLIC LANDS—TIMBER—MESQUITE MAY BE—REV.
STATS. U. S., SEC. 2461, CONSTRUED.—The statute, *supra*, makes
it an offense to cut any live-oak or red-cedar trees or "other tim-
ber on any lands of the United States, with intent to use the
same in any manner other than for the use of the United States
navy." Held, that the word "timber" includes all kinds of wood
used either for building purposes or in the manufacture or con-
struction of useful articles, and was not intended to be confined to
trees or wood of such kinds and sizes as would be especially
adapted to house or ship-building. (United States v. Soto, 230.)
28. SAME—SAME—SAME—QUESTION OF FACT—INDICTMENT—DEMURRER
—REV. STATS. U. S., SEC. 2461, CONSTRUED—BUSTAMANTE V. UNITED
STATES, 4 ARIZ. 344, 42 PAC. 111, DISAPPROVED.—In a prosecution
under the statute, *supra*, for cutting timber upon lands of the
United States, the question of whether or not mesquite is timber
must necessarily be one of fact, dependent upon the character
of the wood charged and shown to have been cut or removed in
each particular case, and is not a question which can properly
be determined upon a demurrer to the indictment. (United States
v. Soto, 230.)

CROSS-EXAMINATION.

Of defendant, limited to matters testified to by him in chief. See Criminal Law, 18.

Scope. See Criminal Law, 15, 17.

See Evidence, 2.

DAMAGES. See Contracts, 2; Pleadings, 3.

DEEDS.

Reformation of. See Evidence, 1, 2, 3.

DEFENSE.

Statute of limitations, substantive, must be raised by answer or plea. See Statute of Limitations, 1.

See Insurance, 1.

DEMURRER.

To answer, no provision for. See Pleadings, 1, 2; Practice, 1.

See Criminal Law, 28.

DISCHARGE.

Of Chinaman, held under Chinese Exclusion Act, binding on United States, the Chinaman only having the right to appeal. See Appeal and Error, 16.

DISCRIMINATION.

Must not be indulged in by canal company acting as public agent or carrier. See Water and Water-Rights, 30.

DIVERSION.

Changing point of. See Water and Water-Rights, 3, 18, 20, 26.

EJECTMENT. See Judgments, 1.

EMBEZZLEMENT. See Criminal Law, 12, 13, 14.

ENTRY.

Subject to existing ditch rights. See Water and Water-Rights, 4.

EQUITY.

On appeal, review confined to decisive issues. See Appeal and Error, 12.

ESTOPPEL.

1. ESTOPPEL—MINES AND MINING—ALLOWING POSSESSION, WHERE IN ACCORDANCE WITH AGREEMENT DOES NOT CREATE ESTOPPEL.—Defendants, having agreed to sell a group of mines, and having given

ESTOPPEL (Continued).

a deed in escrow until final payment of all installments of the purchase price and all rights having been assigned by the original purchasers to a corporation of which plaintiffs were stockholders, and default having been made in the payment of one of the installments, are not estopped to assert their title to the mines by reason of the fact that the corporation was in possession of and working said mines in accordance with the terms of the escrow agreement, the evidence disclosing that the defendants did not know during the time of the occupation and possession of the property by the corporation that the plaintiffs as purchasers of the stock were ignorant of the provisions and the terms of the escrow agreement, or that they as such purchasers had been informed or believed that the corporation owned the title to the mines instead of holding and working them under the license of the escrow agreement. (*Wiser v. Lawler*, 163.)

2. **SAME—SAME—RECEIPTS OF RETURNS FROM ORE—BEING IN ACCORDANCE WITH AGREEMENT DOES NOT CREATE ESTOPPEL.**—Defendants having agreed to sell a group of mines, and having given a deed in escrow until final payment of all installments of the purchase price, and all rights having been assigned by the original purchasers to a corporation of which plaintiffs were stockholders, and default having been made in the payment of one of the installments, defendants are not estopped to assert their title to the mines by reason of the fact that they have received the returns from the ore obtained from such mines during the ownership by the corporation, such disposition of the receipts from the ore being in accordance with the provisions of the escrow agreement, of which the corporation was fully cognizant. (*Wiser v. Lawler*, 163.)
3. **ESTOPPEL—MINES AND MINING—PROSPECTUSES—CONTENTS—EVIDENCE REVIEWED.**—Defendants contracted to sell a group of mines, title to pass upon full payment of all installments of the purchase price. The purchasers assigned their interest to a corporation, which again assigned that interest to another corporation, both assignments being made subject to the original agreement. The second corporation having failed to pay an installment of the purchase price when it became due, plaintiff, a stockholder therein, sought to estop defendants from asserting title to said mines on the ground that they had been parties to fraudulent prospectuses issued by the corporation. Defendants had known of a prospectus prepared for distribution in England which was fastened to the minute-book of the company. This prospectus was never issued, and did not contain a statement that the mines were owned by the company, and was therefore immaterial. One of the defendants knew that the corporation was about to issue an American prospectus, and while in the office of the company was shown a map of the mines. He testified that he did not see on the map any words stating that the mines were owned by the company, as appeared on a map circulated with the prospectus, and the sur-

ESTOPPEL (Continued.)

veyor who prepared the original map testified that he never placed on said map any such words. The prospectus states: "This company is formed to acquire on October 1st, 1892, . . . the Seven Stars Gold Mine." The evidence only shows that the defendants knew of the preparation and circulation of the prospectus and map. It is not shown that they knew what was contained in said prospectus or on the map or that any duty was imposed upon them to ascertain anything in regard to them. It does not appear that defendants were the authors of any false or fraudulent statements either in the prospectus or on the map calculated to mislead or deceive innocent purchasers or that they or either of them had knowledge of any such statements and the falsity thereof and stood by in silence while innocent purchasers were misled thereby. The facts, therefore, present no case for the doctrine of equitable estoppel. (*Wiser v. Lawler*, 163.)

See Water and Water-Rights, 3, 11.

EVIDENCE.

1. EVIDENCE—ADMINISTRATORS—ACTIONS BY OR AGAINST—DEEDS—MIS-DESCRIPTION — REFORMATION — EVIDENCE — ADMISSIBILITY — HUSBAND AND WIFE—WITNESSES—REV. STATS. ARIZ. 1887, PAR. 1865, AND TIT. 25, CHAP. 4, CONSTRUED.—Paragraph 1865, *supra*, provides: "In any action by or against administrators, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statements made by the intestate, unless called to testify thereto by the opposite party or required to testify thereto by the court, . . ." Chapter 4, *supra*, provides, among other things, that "the husband or wife of a party to a proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein." The former statute does not in its terms prohibit the husband or wife of the party to an action from testifying as to any conversation which he or she may have had with the deceased during his lifetime. Therefore in an action by a grantee against a grantor's administratrix to have a deed corrected it is not error to allow the husband of plaintiff to testify to the conversations had between himself and the grantor while alive as to a mistake in the description and as to the land intended to be conveyed. (*Miller v. Miller*, 316.)
2. SAME—SAME—SAME—SAME—SAME—SAME—CROSS - EXAMINATION.—Where defendant's decedent conveyed a certain piece of property to plaintiff and later gave plaintiff a second deed, describing the same property, and plaintiff brought an action to reform the second deed so as to cover other land, it was not error for the court to sustain an objection to a question put to plaintiff's witness on cross-examination, asking if witness had not told a third party that he thought the title good to the land first conveyed, inasmuch as

EVIDENCE (Continued).

the witness was not a party to the action, and there was no evidence which this would tend to contradict. (*Miller v. Miller*, 316.)

3. ~~SAME—SAME—SAME—SAME—SAME—SAME~~ CONVERSATION — IN ABSENCE OF GRANTEE—NOT ADMISSIBLE.—Evidence of a conversation between a witness and the deceased grantor, after a second deed was executed, and in the absence of the grantee, as to the purpose for which he had given the second deed, is not admissible. (*Miller v. Miller*, 316.)
4. EVIDENCE — COUNTY WARRANT—PAYMENT—SUFFICIENCY.—A county warrant signed by the chairman and secretary of the board of supervisors, indorsed by the payee, and marked "Redeemed and canceled" by the county treasurer is sufficient evidence of the payment of money voted and for which such warrant was issued. (*Schumacher v. Pima County*, 269.)
5. SAME — ADMISSIBILITY — RESULTS OF EXAMINATION OF VOLUMINOUS RECORDS AND DOCUMENTS MAY BE GIVEN.—In an action by a county against the supervisors thereof to recover money unlawfully paid to the probate judge it is proper to admit testimony as to the results of the examination of the records of the probate court, it being a recognized exception to the general rule of evidence that when it is necessary to prove the results of voluminous facts or the examination of many books and papers, and the examination cannot conveniently be made in court, the result may be proved by the person who made the examination. (*Schumacher v. Pima County*, 269.)
6. SAME — SUFFICIENCY — COUNTIES — OFFICE AND OFFICERS — ACTION AGAINST SUPERVISORS FOR MONEY UNLAWFULLY PAID—BOARD OF SUPERVISORS.—Evidence tending to show that during a period of years the legal fees chargeable by the probate court would be \$4,088.75, and that the probate judge had charged only \$2,190.40, and paid to the treasurer but \$1,643.45, is sufficient to sustain a judgment against the supervisors for having unlawfully paid salary to the probate judge when he was indebted to the county. (*Schumacher v. Pima County*, 269.)
 - Conflict in, findings will not be disturbed. See Appeal and Error, 11, 17, 18.
 - Conflict in, verdict will not be disturbed. See Appeal and Error, 20, 31, 35.
 - Must be incorporated in record before errors dependent thereon will be reviewed. See Appeal and Error, 21.
 - Sufficiency and admissibility of cannot be reviewed when not in Record. See Appeal and Error, 23.
 - See Appeal and Error, 31; Contracts, 1; Criminal Law, 1, 2, 4, 15, 16, 18; Live-Stock, 1; Personal Injuries, 2; Public Lands, 3; Trespass, 1; Water and Water-Rights, 1, 2.

EXCLUSION ACT. See Appeal and Error, 16.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—REJECTION—PRESUMPTION**—PAR. 1113, REV. STATS. ARIZ. 1887, CONSTRUED.—In an action against an administrator on a note given by his decedent, where plaintiff charged that the claim, duly verified, was left with the attorney for the administrator, in accordance with the notice to creditors, and that subsequently the claim was lost or destroyed, but does not state that the claim was approved, there is no presumption that the administrator approved the claim. If any presumption is indulged, it must be that either the claim was rejected or not acted upon, for the reason that paragraph 1113, *supra*, provides that "If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day." (Underwood v. Brown, 19.)
2. **SAME—SAME—ACTION—LIMITATIONS**—PAR. 1115, REV. STATS. ARIZ. 1887, CONSTRUED.—When suit against an administrator on a claim against the estate was not brought until nearly eight months after it was presented and not acted upon, the plaintiff is not entitled to recover, as paragraph 1115, *supra*, provides that "When a claim is rejected either by the executor, or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator within three months after date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is forever barred." (Underwood v. Brown, 19.)

FEEES.

Duty of probate judge to collect and turn over to county. See Counties, 1.

FINDINGS OF FACT.

1. **FINDING OF FACT—SUPPORTED BY EVIDENCE—WILL NOT BE DISTURBED.**
—There being evidence to support a finding of fact, it will not be disturbed by an appellate court. (Main v. Main, 149.)
General, validity of judgment based upon. See Appeal and Error, 34.
When general will support judgment. See Appeal and Error, 19.
See Appeal and Error, 11, 17, 18, 32.

FORCIBLE ENTRY AND DETAINER.

Appeal-bond jurisdictional. See Appeal-Bond, 1, 2.
See Certiorari, 2.

FORECLOSURE. See Brokers, 1.

FOREIGN DECISIONS.

Except New Mexico of no force in determining questions relative to water-rights in Arizona. See Water and Water-Rights, 13.

FRAUD.

Need not be alleged in action against trustee for appropriating property of *cestui que trust*. See Trusts, 1, 2.

FUNDING. See Bonds, 1, 2, 3; County Bonds, 1.

FUTURE PROFITS. See Contracts, 2.

GARNISHMENT.

Situs of debt. See Insurance, 1.

GOOD FAITH.

Bonds issued in refunded. See County Bonds, 1.

Immaterial where board of supervisors wrongfully pay out money.

See Board of Supervisors, 1.

HARMLESS ERROR.

Not ground for reversal. See Criminal Law, 26.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND TO WIFE—SEPARATE PROPERTY—PAR. 2102, REV. STATS. ARIZ. 1887, CONSTRUED.**—Under the statute, *supra*, making property acquired during coverture the common property of the husband and wife, and empowering the husband only to dispose of it during the coverture, a conveyance of community property from the husband to the wife changes its character from community to the separate property of the wife. (Main v. Main, 149.)

See Evidence, 1.

IDEM SONANS.

When doctrine of applicable. See Criminal Law, 25.

IMPEACHMENT. See Criminal Law, 15, 16, 17.

INCORPORATION.

Of municipalities, not a taking of property without due process of law. See Constitutional Law, 2.

Portion of a community may incorporate a municipality. See Constitutional Law, 3.

INDICTMENT.

Sufficiency of. See Criminal Law, 12, 13, 14.

See Criminal Law, 28.

INFERIOR TRIBUNAL.

Jurisdiction of must appear on face of proceedings. See Jurisdiction, 1.

INJUNCTION.

Will only be granted where plaintiff shows clear and unexceptionable right. See Taxes and Taxation, 5.

INSTRUCTIONS TO JURY.

As to burden of proof. See Criminal Law, 8, 20.

As to credibility of defendant as a witness. See Criminal Law, 10.

As to malice. See Criminal Law, 9, 19.

As to self-defense. See Criminal Law, 21, 22, 23, 26.

Definition of murder. See Criminal Law, 11.

Expression of opinion by court, what is not. See Criminal Law, 4.

Not error to omit, where failure to request, when. See Criminal Law, 24.

Stating a legal principle in the abstract applicable to the evidence in the case not error, nor an assumption of the existence of facts. See Criminal Law, 3.

See Contracts, 2; Mines and Mining, 6; Water and Water-Rights, 1, 2.

INSURANCE.

1. **INSURANCE—DEFENSE—GARNISHMENT—SITUS OF DEBT—JURISDICTION—ACTION IN REM.**—Plaintiff in Arizona sued defendant on an insurance policy. Defendant set up as a defense that it was engaged in a general fire-insurance business, with its general offices in San Francisco, where the general manager conducted all business and kept all funds for the payment of losses; that after receipt of plaintiff's proofs of loss, plaintiff's California creditors brought suit against it, service being had on plaintiff by publication, and garnished, under the attachment laws of the state of California, the amount due plaintiff upon his policy of insurance, and that upon judgment against plaintiff in said suits defendant discharged its liability to plaintiff by paying to plaintiff's creditors in garnishment proceedings the full amount due plaintiff upon his policy of insurance. *Held*, that the situs of the debt was in California, subject to garnishment by plaintiff's creditors, and therefore payment under said garnishment proceedings was a defense to plaintiff's action. (*National Fire Ins. Co. v. Ming*, 6.)

IRRIGATION. See Water and Water-Rights.

ISSUES. See Pleading, 3; Water and Water-Rights, 1, 2.

JUDGMENTS.

1. **JUDGMENTS—COLLATERAL ATTACK—RECORD—PRESUMPTIONS—NONE OF IDENTITY OF PERSONS FROM IDENTITY OF NAMES—VALIDITY—**

JUDGMENTS (Continued).

EJECTMENT—BRYAN v. KALES, 3 ARIZ. 423, 31 PAC. 517, FOLLOWED.—Plaintiff brought an ejectment suit to recover possession of certain premises, his title resting in part upon a sale thereof, under a judgment entered in an action by K. against K., administrator. *Held*, that a judgment in an action is an adjudication that the court had jurisdiction, and on collateral attack it will not be presumed from a mere identity of names that the parties were identical and the judgment invalid. (*Allen v. Evans*, 354.)

Court has no power to vacate after expiration of term. See Courts, 1.

Findings, general, validity of judgment based upon. See Appeal and Error, 34.

Must be affirmed where no error appears in record if no assignment of errors. See Appeal and Error, 6.

On pleadings, when granted. See Pleading, 1; Practice, 1.

Power of supreme court to render on appeal. See Appeal and Error, 3.

When general finding on issues will support. See Appeal and Error, 19.

JUDICIAL NOTICE.

1. **JUDICIAL NOTICE—RISING AND SETTING OF SUN.**—Courts take judicial notice of the time of the rising and setting of the sun. (*Taylor v. Territory of Arizona*, 234.)

JURISDICTION.

1. **JURISDICTION—INFERIOR TRIBUNALS—MUST APPEAR ON THE FACE OF PROCEEDINGS—PRESUMPTIONS.**—In tribunals of special and limited jurisdiction the particular facts and circumstances upon which their jurisdiction is based must appear upon the face of the proceedings. No presumptions are indulged in favor of their jurisdiction, and it will be assumed that jurisdiction was wanting where the record does not show affirmatively that it has been acquired. (*Copper Queen Consolidated Mining Company v. Board of Equalization of Cochise County*, 364.)

Forcible entry and detainer. See Appeal-Bond, 1.

Of supreme court. See Appeal and Error, 36, 37; Supreme Court, 1.

See Certiorari, 2; Insurance, 1.

JUROR.

1. **JUROR—OPINION—UNQUALIFIED—PAR. 1629, PEN. CODE, REV. STATS. ARIZ. 1887—DISQUALIFICATION.**—A juror is disqualified to sit in the trial of a case when he has formed or expressed an unqualified opinion as to the guilt or innocence of the defendant, within the provisions of the statute, *supra*. An opinion less decided than this may also be sufficient of itself, or in connection with other proof,

JUORO (Continued).

to exclude a juror, when it appears that it will prevent him from acting with entire impartiality. (*Brady v. Territory of Arizona*, 12.)

2. **SAME—BIAS—QUESTION OF FACT FOR COURT TO DECIDE—APPEAL AND ERROR—REVIEW—ERROR MUST BE MANIFEST.**—A challenge of a juror on the ground that the juror has such an opinion as would prevent him from acting with entire impartiality raises an issue of fact for the court to determine, and the finding of the trial court upon that issue should not be set aside unless the error is manifest. (*Brady v. Territory of Arizona*, 12.)

3. **SAME—SAME—VOIR DIRE—TESTIMONY GIVEN ON—TRIAL COURT TO DECIDE ON.**—The Penal Code (par. 1629) provides that a juror who has formed or expressed an unqualified opinion is disqualified from acting in a criminal case. A juror testified on his *voir dire* that he had formed an opinion which would require evidence to overcome, from talking with persons who he thought knew the facts, and from hearing a part of the testimony on a former trial; that he would want considerable more evidence to come to a conclusion as to the guilt or innocence of the accused; that he would not be able to find a verdict from what he then knew; that he had known defendant for about twelve years, and had a friendly feeling for him; but that he could determine the case entirely on the evidence, and would disregard any opinion that he had previously obtained. *Held*, not to show such bias on the part of the juror as would warrant a reversal of a conviction on the ground of error in overruling a challenge for actual bias. (*Brady v. Territory of Arizona*, 12.)

LARCENY.

Facts tending to prove, also tend to prove burglary, where committed in connection therewith. See *Criminal Law*, 4.

See *Criminal Law*, 2.

LEASE. See *Mines and Mining*, 1.

LEGISLATIVE AUTHORITY.

1. **LEGISLATIVE AUTHORITY—OF CONGRESS—OF TERRITORIAL LEGISLATURE—ORGANIC LAW—PARAMOUNT LAW—WHAT CONSTITUTES—CONSTITUTIONAL LAW—ACTS CONG. JUNE 25, 1890, AUGUST 3, 1894, JUNE 6, 1896, AND REV. STATS. ARIZ. 1887, TIT. 31, AND LAWS ARIZ. MARCH 19, 1891, CITED—LAWS ARIZ. 1899, ACT NO. 32, HELD VOID.**—Congress having full authority to legislate directly for the territory, and the territorial legislature having only such power as is specifically delegated to it by Congress, whenever the latter legislates upon any subject pertaining to the territory such legislation has the force and effect of a constitutional provision, and becomes a part of the Organic Law, and therefore the act

LEGISLATIVE AUTHORITY (Continued).

of Congress of June 25, 1890, *supra*, amending, approving, and confirming, "subject to future territorial legislation," Revised Statutes of Arizona, title 31, *supra*, creating a board of loan commissioners for the funding of the existing territorial indebtedness, having been accepted by the territorial legislature by act of March 19, 1891, *supra*, is now the paramount law upon the subject of funding, and becomes a part of the Organic Law, to the extent that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress, and act No. 32, *supra*, repealing the territorial acts creating such commission is void. (*Utter v. Franklin*, 300.)

LEGISLATURE.

Territorial, legislative authority of. See *Legislative Authority*, 1.
Territorial, power of. See *Offices and Officers*, 1.

LESSOR AND LESSEE. See *Mines and Mining*, 2.

LIENOR.

Subsequent, priority of. See *Mortgages*, 1.

LIMITATIONS.

On actions against executors and administrators. See *Executors and Administrators*, 2.

On filing adverse. See *Appeal and Error*, 7.

LIVE-STOCK.

1. LIVE-STOCK—TRANSFER—BILL OF SALE—VALIDITY OF—EVIDENCE—ACT No. 6, SEC. 61, LAWS OF 1897, CONSTRUED.—Section 61, *supra*, provides that cattle running at large upon the range may be transferred by a sale and delivery of the marks and brands of such animals. It does not, however, prohibit the sale or transfer of live-stock in any other manner. *Held*, that the owner of an undivided interest in cattle running at large upon the range can transfer his interest the same as any other personal property, without delivery, by a bill of sale properly executed, acknowledged, and recorded. (*Brill v. Christy*, 217.)

2. SAME—MARKS AND BRANDS—REGISTRATION—CERTIFICATE—EVIDENCE OF OWNERSHIP OF BRAND BUT NOT OF CATTLE—ACT No. 6, SEC. 50, LAWS OF 1897, CONSTRUED.—The statute, *supra*, makes the certificate of the registration of a brand on cattle competent evidence of registration of such brand and *prima facie* evidence of ownership. In an action against an administratrix to recover an undivided interest in cattle on the range, the title to the brand not being in controversy, a certificate issued pursuant to the provisions

LIVE-STOCK (Continued).

of statute, *supra*, is not competent evidence for the purpose of showing that the title to the cattle is in the party in whose name the brand is recorded. (Brill v. Christy, 217.)

LOAN COMMISSIONERS.

Joint authority given to majority. See Bonds, 3.

Powers of. See Bonds, 2, 3.

LOCAL LAWS. See Constitutional Law, 4.

LOCATION.

Of mining claim. See Mines and Mining, 3, 4, 5, 6.

MAJORITY.

Of loan commissioners, have power to act. See Bonds, 3.

MALICE.

Instruction to jury on what constitutes. See Criminal Law, 9, 19.

MANDAMUS.

1. **MANDAMUS—OPERATES ON OFFICE—ABATEMENT—CHANGE OF PERSONNEL DOES NOT CAUSE—REVIVOR—NOT NECESSARY AGAINST SUCCESSOR OF OFFICER.**—The writ of *mandamus* operates on the office rather than on the individual who occupies the office, and therefore does not abate by a change in the personnel of the office, and no revivor is necessary against a successor of the officer against whom the proceedings were instituted. (Utter v. Franklin, 300.)

See County Bonds, 1.

MARKS AND BRANDS.

Registration of. See Live-Stock, 2.

MECHANIC'S LIEN.

Interests subject to. See Mines and Mining, 2.

Purchaser not agent of owner, within purview of statute governing.

See Mines and Mining, 1.

MEMBERS.

Status of, in unincorporated irrigating ditch company that of tenants in common. See Water and Water-Rights, 5.

MESQUITE.

May be timber, question of fact. See Criminal Law, 27, 28.

MINERAL LANDS.

Right to cut timber on. See Public Lands, 1.

What constitutes. See Public Lands, 1.

MINES AND MINING.

1. MINES AND MINING—CONTRACT TO PURCHASE—MECHANIC'S LIEN—PURCHASER NOT AGENT OF OWNER—LEASE—REV. STATS. ARIZ. 1887, PAR. 2276, 2278, 2280, CONSTRUED—*EAMAN V. BASHFORD & BURMISTER*, 4 ARIZ. 199, 37 PAC. 24, DISTINGUISHED.—Paragraph 2276, *supra*, provides for a mechanic's lien on mines for any sums due for labor performed or materials furnished said mines. Paragraph 2278, *supra*, provides that all persons who furnish labor, machinery, or other material for the construction or operation of any mill or hoisting works at the request of the owner or his agent shall have a lien therefor. Paragraph 2280, *supra*, provides that the word "agent" shall be construed to include persons having charge of any mine or mining claim. Defendant company contracted for the sale of its mining claim, the contract providing that the deed should remain in escrow until all payments were made. The purchaser was to go into possession of the mine and operate it at his own expense and deposit the bullion or amalgam to the credit of the defendant company as collateral security for deferred payments. In the event of default in payment, the purchaser was to vacate the property. In accordance with the terms of such contract, the purchaser took possession of the property and employed plaintiffs to work on the same. Plaintiffs' accounts for labor were not paid, and they seek to enforce their liens against the defendants, the owners of the mine. *Held*, distinguishing *Eaman v. Bashford & Burmister*, *supra*, that the purchaser was not an agent of the owners, but was at most a mere lessee, and that while the plaintiffs have a lien against the particular estate of the lessee, they have none against the property itself or against the owners' estate in said property. (*The Walter C. Hadley Co. v. Cummings*, 258.)
2. MINES AND MINING—LESSOR AND LESSEE—MECHANIC'S LIEN INTEREST SUBJECT TO—REV. STATS. ARIZ. 1887, PAR. 2276, CITED—*GATES V. FREDERICKS*, 5 ARIZ. 343, 52 PAC. 1118—*EAMAN V. BASHFORD & BURMISTER*, 4 ARIZ. 199, 37 PAC. 24, AND *HADLEY CO. V. CUMMINGS*, ANTE, P. 258, 64 PAC. 443, APPROVED.—Under the statute, *supra*, providing that all miners, laborers, and others who may labor, and all persons who may furnish material of any kind, designed or used in or upon any mine or mining claim, and to whom wages are due for such labor or materials, shall have a lien upon the same for such sums as are unpaid, a miner, employed under a contract with the lessee of a mining claim, cannot foreclose a mechanic's lien upon the claim as against the owner, though entitled to subject the lessee's interest thereto. (*Griffin v. Hurley*, 399.)
3. MINES AND MINING—LOCATION OF CLAIM—NOTICE OF LOCATION—DESCRIPTION—CONSTRUCTION.—As to a mining location notice, there is no rule of necessity, such as exists in the construction of a deed, which requires that the term "easterly," used without quali-

MINES AND MINING (Continued).

fying language, shall denote due east, and the term "westerly" shall denote due west. In the sense in which "easterly" is used by the miner and prospector, the term denotes the general course of a vein or location running nearer towards the east than any of the other cardinal points of the compass. (*Wiltsee v. King of Arizona etc. Company*, 95.)

4. ~~SAME—SAME—SAME—SAME—SAME~~—WHERE BOUNDARIES ARE NOT DEFINITELY LOCATED BY ERECTION OF MONUMENTS AT TIME—AREA RESERVED.—A notice of location which gives the course of the location as running westerly so many feet from a discovery shaft or point of discovery, until boundaries are definitely located by the erection of monuments, must be held to reserve from entry by subsequent locators the surface area which might be included within any location so made that, were a line drawn lengthwise through the center of said claim from the west center end through the point of discovery to the east center end of said claim, said line would lie at some point between east forty-five degrees north and east forty-five degrees south from the point of discovery. (*Wiltsee v. King of Arizona etc. Company*, 95.)
5. ~~SAME—SAME—SAME—SAME—SAME~~—WHERE MONUMENTS ARE PLACED—INTERVENING RIGHTS PROTECTED.—Should the locator, at the time of posting his notice, in addition to giving the general course of his vein, place monuments at the center of each end-line, and thus definitely give notice to subsequent locators as to the meaning and intent of the language used in his notice as to the general course of his location, under the law he is bound by the location thus made and defined, so that he may not thereafter, and during the ninety days permitted for the perfection of his location, change the course of his location to the prejudice of intervening rights. (*Wiltsee v. King of Arizona etc. Company*, 95.)
6. ~~SAME—SAME—SAME—SAME—SAME~~—INSTRUCTIONS TO JURY.—Where the original location notice as posted did not definitely locate the easterly end of the claim, the court properly refused to charge that the law requires the location notice to substantially conform to the location certificate, and if the locator changed the easterly end of the claim from where it was first located by his location notice to a point eight hundred feet northerly, as fixed by the location certificate, such change was void, as it was not a substantial compliance with the notice. (*Wiltsee v. King of Arizona etc. Company*, 95.)

See Appeal and Error, 7; Estoppel, 1, 2, 3; Statute of Limitations, 1.

MORTGAGES.

1. MORTGAGES—DEFECTIVE ACKNOWLEDGMENT—NOTICE—CONSTRUCTIVE—SUBSEQUENT LIENOR—PRIORITY OF—PAR. 2601, REV. STATS. ARIZ.

MORTGAGES (Continued).

1887, CONSTRUED.—Under the statute, *supra*, providing that “all deeds of trust and mortgages whatsoever which shall hereafter be made and executed shall be void as to all creditors and subsequent purchasers for value without notice, unless they shall be acknowledged or proved and filed with the recorder to be recorded, as required by law,” one who acquired a lien on the property subsequent to the execution of a defectively acknowledged mortgage, and who has had no notice of the same, save and except such notice as the recording thereof imparts, is entitled to precedence as a prior lienor in an action to correct such defect and foreclose the mortgage. (Reid v. Kleyenstauber, 58.)

2. **SAME—SAME—CORRECTION—NOT RETROACTIVE—PARS. 2601 AND 2621, REV. STATS. ARIZ. 1887, CONSTRUED.**—Paragraph 2621, *supra*, provides: “When the acknowledgment or proof of the execution of any instrument in writing may be properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate. This statute in connection with par. 2601, *supra*, must be construed not as permitting a defective certificate of acknowledgment to be amended so as to relate back and give constructive notice from the time of the recording of such instrument, but only as affording a remedy for the correction of such defective certificate so as to make it effective as notice against all purchasers, encumbrancers, and creditors from the time the defect be cured. (Reid v. Kleyenstauber, 58.)

MOTION FOR NEW TRIAL.

Necessity for. See Appeal and Error, 29, 33.

Presumptively denied by operation of statute, when. See Appeal and Error, 25.

Time for filing and how computed. See Appeal and Error, 26, 27, 28.

MUNICIPALITIES.

Incorporation of not a taking of property without due process of law. See Criminal Law, 2, 3.

MURDER.

Definition of. See Criminal Law, 11.

Lesser offenses included. See Criminal Law, 24.

See Criminal Law, 7, 8, 9, 10, 19, 20, 21, 22, 23, 25.

NEGLIGENCE. See Appeal and Error, 20; Water and Water-Rights, 1, 2.

NEW BOND.

Cannot be given on appeal after time for taking appeal has expired, the first bond being defective. See Appeal-Bond, 2.

NEW TRIAL.

Will not be granted where conflict of evidence. See Appeal and Error, 40.

See Motion for New Trial.

NIGHT-TIME.

Defined. See Criminal Law, 1.

NOTICE.

Constructive, what not binding on subsequent lienor. See Mortgages, 1.

Not necessary to be given to all parties to render the incorporation of municipality valid. See Constitutional Law, 2.

Of location of mining claim, description and construction. See Mines and Mining, 3, 4, 5, 6.

OFFICERS.

1. OFFICERS—SHERIFFS—EXTRA COMPENSATION—SEC. 1765, REV. STATS.

U. S. CONSTRUED.—Even if the sheriff were to be considered as a United States officer, so far as concerns his care of United States prisoners in the county jail, yet under section 1765 of the Revised Statutes of the United States, providing that no person whose salary is fixed by law shall receive any additional pay for any service unless the same is authorized by law, he is not entitled to extra pay for the care of such prisoners beyond his regular salary as county sheriff. (*Avery v. Pima County*, 26.)

2. SAME—SAME—SAME—COMPENSATION PROVIDED BY LAW CONCLUSIVE

—PARS. 496, 1972, 2447, 2457 (AS AMENDED BY ACT OF MARCH 19, 1891), REV. STATS. ARIZ. 1887, CONSTRUED.—The Revised Statutes, *supra*, define the duties of county sheriffs and prescribe their salaries. No provision of the statutes of Arizona authorizes payment to the sheriff for "caring for prisoners, whether United States prisoners or others. Where no compensation is by law attached to the office, the officer can recover none. Where a compensation is provided by law for an officer, it is conclusive, and the officer can recover nothing beyond it. Therefore, payment of a claim for "care of prisoners" is unauthorized. (*Avery v. Pima County*, 26.)

OFFICES AND OFFICERS.

1. OFFICES AND OFFICERS—ASSESSOR—RIGHT OF OFFICE—NOT A VESTED

RIGHT—LEGISLATURE—POWER OF—ACT NO. 51, LAWS OF ARIZ. 1895, AS AMENDED BY ACT NO. 24, LAWS OF 1897, AND ACT NO. 63, LAWS OF 1899, CONSTRUED.—Act No. 51 of the Session Laws of 1895 was amended by act No. 24 of the Session Laws of 1897 so that in counties of the first and second classes the office of assessor should be filled by election. The second act was to go into effect January 1, 1899. At the general election held in November, 1898, appellant was elected assessor of Cochise County and entered upon

OFFICES AND OFFICERS (Continued).

the discharge of his duties January 1, 1899. On the 16th of March, 1899, the legislative assembly further amended act No. 51 of the Session Laws of 1895 by providing that in counties of the first and second classes an assessor shall be appointed by the board of supervisors for the years 1899-1900, the term of office to begin January 1, 1899, and that in 1900 and biennially thereafter an assessor should be elected. Act No. 63, Session Laws, 1899. Appellee, having been appointed under the last amendment, demanded the office from the appellant, elected under the first amendment. *Held*, that the last amendment did not impair any obligation of contract; that as the method of filling the office and duration of the term had not been regulated by Congress or constitutional provision, the legislature had not deprived appellant of any vested right, and appellee was entitled to the office. (*Harwood v. Perrin*, 114.)

See Counties, 1; Evidence, 6.

OPINION.

Unqualified, disqualifies juror. See Juror, 1.

ORGANIC LAW. See Legislative Authority, 1.

PARAMOUNT LAW.

What constitutes. See Legislative Authority, 1.

PARTIES DEFENDANT. See Partition, 1.

PARTITION.

1. **PARTITION—PARTIES DEFENDANT—REV. STATS. ARIZ., PAR. 2394, CITED.**

—In an action by the mortgagee of an undivided one half of a library for partition against purchaser of the other undivided one half, alleging that said purchaser was in exclusive possession, where it appears that the defendant held possession of only an undivided one half, and the widow of the mortgagor held possession of and claimed title to the other undivided one half, the widow is the real party in interest, and she not having been joined as party defendant, there was a defect of parties defendant, and there was no error in the court entering judgment for the defendant. (*Goldman v. Millay*, 285.)

PARTNERSHIP.

Not liable for acts of individual members not done for its benefit or in its behalf. See Trespass, 1.

PAYMENT.

Of county warrant. See Evidence, 4.

PERSONAL INJURIES.

1. PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

—In an action for damages for personal injuries the burden of proving contributory negligence is upon the defendant. (*Maricopa etc. R. R. Co. v. Dean*, 104.)

2. SAME—SAME—EVIDENCE—CREDIBILITY OF WITNESS.—The testimony of two witnesses as to admissions of the driver of the vehicle in which decedent was when struck by defendant's train, contradictory to his testimony that he looked and listened before attempting to cross, is not binding upon decedent, but only goes to the driver's credibility as a witness, which is purely within the province of the jury, and not subject to review on appeal, and does not make out a case of contributory negligence sufficient to warrant a reversal, though corroborated by other evidence. (*Maricopa etc. R. R. Co. v. Dean*, 104.)

See Appeal and Error, 20.

PLEADING.

1. PLEADING—PRACTICE—NO DEMURRER TO ANSWER—JUDGMENT ON

PLEADINGS—WHEN GRANTED—*MILES v. McCallan*, 1 ARIZ. 491, 3 PAC. 610, FOLLOWED.—There is no express provision in the statutes for a demurrer to the answer, and judgment may be rendered upon the pleadings when the answer does not deny any of the material allegations of the complaint, or does not set up new matter constituting a defense. If the answer denies in specific terms the material allegations of the complaint, or if it sets up new matter constituting a defense, judgment upon the pleadings may not then be rendered. (*Goldwater v. Bowen*, 200.)

2. SAME—ANSWER—SUFFICIENCY.—Plaintiff sued for interest due on a contract in writing, whereby plaintiff conveyed certain property to defendant, defendant to pay purchase price within four years and certain interest monthly until the purchase price was paid. Defendant answered that the instrument did not contain the whole of the agreement and set up the complete contract, and, second, that the contract was an option, which he had exercised and surrendered. *Held*, this answer raised an issue of fact to be tried, and therefore it was erroneous to render judgment on the pleadings for plaintiff. (*Goldwater v. Bowen*, 200.)3. PLEADINGS—DAMAGES—ISSUES—AMENDMENTS.—Where the complaint set out facts and prayed for damages which had accrued up to 1898, and no amendment or supplemental complaint covering the year 1898 was ever filed, it was improper to receive evidence of any injury sustained in 1898, although an amendment, changing the amount of damages claimed, was filed by leave of the court after trial, to conform to the proofs. (*Miller v. Douglas*, 41.)

Of statute of limitations. See Statute of Limitations, 1.

See Water and Water-Rights, 1, 2.

PRACTICE.

1. **PRACTICE—DEMURRER TO ANSWER—JUDGMENT ON PLEADINGS—MILES v. McCALLAN**, 1 ARIZ. 491, 3 PAC. 610, APPROVED.—There is no express provision in our statute for a demurrer to the answer, and judgment may be rendered upon the pleadings when the answer does not deny any of the material allegations of the complaint, nor set up new matter constituting a defense. (*Finley v. City of Tucson*, 108.)

See Pleading, 1, 2.

PRESCRIPTION. See Water and Water-Rights, 12.

PRESUMPTIONS.

Against jurisdiction of board of equalization, unless all facts necessary to give it affirmatively appear in record. See Taxes and Taxation, 1.

None indulged in favor of inferior tribunal. See Jurisdiction, 1.

None of guilt arising from recent possession of stolen goods. See Criminal Law, 2.

None of identity of persons from identity of names. See Judgments, 1.

None that executor approved claim, rather that he disapproved or never acted upon it. See Executors and Administrators, 1.

Of innocence. See Criminal Law, 2.

Of regularity of court's proceedings. See Costs, 1.

That motion for new trial was denied by operation of statute. See Appeal and Error, 25.

PRIORITY.

According to oldest titles limited to public ditches. See Water and Water-Rights, 9.

Governs in absence of contract. See Water and Water-Rights, 8.

In private ditches, determined by appropriation and use. See Water and Water-Rights, 9.

Of subsequent lienor. See Mortgages, 1.

PRIVATE AGENT.

Canal company is, when. See Water and Water-Rights, 27.

PRIVATE DITCHES. See Water and Water-Rights, 9.

PROBATE JUDGE.

Fees, duty of to collect and turn over to county. See Counties, 1.

Salary fixed. See Counties, 1.

PROSPECTUSES. See Estoppel, 3.

PUBLIC AGENT.

Canal company is, when. See Water and Water-Rights, 28.

PUBLIC LANDS.

1. PUBLIC LANDS—MINERAL LANDS—WHAT CONSTITUTES—RIGHT TO CUT TIMBER—ACT CONG. JUNE 3, 1878, CONSTRUED.—Mineral in sufficient quantities to justify exploration and development, and in quantities which it will pay to work, must be shown to exist, and the existence thereof in the land must be demonstrated as a present fact, in order to justify the cutting of timber therefrom, or the purchase of such timber after being cut, under the act of June 3, 1878, providing that certain persons are "hereby authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or trees growing or being on the public lands, said lands being mineral and not subject to entry . . . except for mineral entry." (United States v. Copper Queen etc. Mining Company, 80.)
2. PUBLIC LANDS — TIMBER — BONA FIDE RESIDENTS MAY CUT — ACT CONG. JUNE 3, 1878, CONSTRUED.—The act, *supra*, providing that "All citizens of the United States and other persons *bona fide* residents," etc., includes aliens as well as citizens, provided that they be *bona fide* residents of the states, territories, and districts mentioned, among the persons authorized to fell and remove any timber or other trees on the public mineral lands. (United States v. Copper Queen etc. Mining Company, 80.)
3. SAME — SAME — EVIDENCE — BONA FIDE RESIDENCE—WHAT CONSTITUTES—ACT CONG. JUNE 3, 1878, CONSTRUED.—The statement that witness "moved" into Rock Creek in 1883, having reference to his change of residence, in connection with the fact that he was for ten years engaged in an extensive lumbering business at Rock Creek, is sufficient to establish his *bona fide* residence within the territory so as to give him the privilege of cutting timber on mineral lands, as provided in act of June 3, 1878. (United States v. Copper Queen etc. Mining Company, 80.)
4. SAME—SAME—SECRETARY OF INTERIOR—AUTHORITY AND LIMITATIONS IN MAKING RULES AND REGULATIONS UNDER ACT CONG. JUNE 3, 1878.—The act of June 3, 1878, regarding the cutting of timber on mineral lands gives the secretary of the interior authority to make rules and regulations; and so far as they may relate to the protection of the timber and of the undergrowth growing upon such mineral lands and for other purposes, they have the effect of law. But it does not follow that the secretary of the interior may prescribe from what lands timber may be cut, or in any way enlarge or detract from the privileges granted in said act. (United States v. Copper Queen etc. Mining Company, 80.)
5. PUBLIC LANDS—TOWN-SITES—TRUSTEE—AUTHORITY TO DISPOSE OF UNOCCUPIED LOTS—WHENCE DERIVED—REV. STATS. U. S., SEC. 2387,

PUBLIC LANDS (Continued).

COMP. LAWS ARIZ. 1871, SEC. 3, AND REV. STATS. ARIZ. 1887, TITLE 9, CHAP. 2, SECS. 1, 22, CONSTRUED—CLARK v. TITUS, 2 ARIZ. 122, 21 PAC. 818, FOLLOWED.—The Revised Statutes of the United States (Sec. 2387, *supra*) provides that certain officers may enter at the proper land office land settled and occupied as a town-site, in trust for the several use and benefit of the occupants thereof, the execution of said trust as to the disposal and sale of lots in said town, and of the proceeds thereof to be regulated by the legislature of the territory or state in which the same may be situated. The Compiled Laws of Arizona of 1871 (chap. 89, sec. 3), in force when the entry of the town-site of Tucson was made, provides that it shall be the duty of the party entering such town-site "to convey the same to the occupants and inhabitants thereof, according to their respective interests, in the manner hereinafter described." The Revised Statutes of Arizona of 1887, *supra*, provides that whenever three or more citizens of a town located, or that may hereafter be located, on public lands request the proper authorities in writing, such authorities shall enter so much of the land under the act of Congress, *supra*, as is necessary for town purposes. Section 22, *supra*, provides that the lots undisposed of, the title to which remains in the trustee, shall be subject to entry and purchase from the trustee. *Held*, that *mandamus* will not lie to compel the trustee to transfer certain lots to petitioner under the provisions of Revised Statutes of Arizona of 1887, *supra*, inasmuch as the Compiled Laws of 1871, *supra*, controls the disposal of lots in Tucson. (Martin v. Hoff, 247.)

See Criminal Law, 27, 28; Water and Water-Rights, 4.

PUBLIC PROPERTY.

Water continues to be, even after diversion until actually applied to use. See Water and Water-Rights, 21.

RECENT POSSESSION OF STOLEN GOODS.

If unexplained, a circumstance from which the jury may infer complicity therein, but no presumption of guilt arises therefrom. See Criminal Law, 2.

RECORD.

Minute entry of evidence offered not part of. See Appeal and Error, 22.

Must affirmatively show all facts necessary to give jurisdiction to board of equalization. See Taxes and Taxation, 1, 2.

Must contain evidence before errors dependent thereon will be reviewed. See Appeal and Error, 21.

No error appearing in, judgment affirmed if no assignment of errors. See Appeal and Error, 6.

REGISTRATION.

Of marks and brands. See Live-Stock, 2.

RENTAL. See Brokers, 1.

REPEAL BY IMPLICATION. See Statutory Construction, 1.

RESIDENCE.

Bona fide, what constitutes. See Public Lands, 3.

RESULTING TRUST. See Trust, 1, 2, 3.

REVIEW.

Does not appertain to failure of court to make merely evidentiary findings. See Appeal and Error, 32.

Error must be manifest. See Juror, 2.

Scope of. See Appeal and Error, 7, 29.

Scope of in equity case. See Appeal and Error, 12.

REVIVOR.

Not necessary against successor in office, in *mandamus* proceedings.

See Mandamus, 1.

RISING AND SETTING OF SUN.

Courts take judicial notice of the time of. See Judicial Notice, 1.

SALE.

For delinquent taxes. See Taxes and Taxation, 3, 4, 5.

See Water and Water-Rights, 10.

SECRETARY OF INTERIOR.

Authority and limitations on, in making rules and regulations governing timber-cutting on mineral lands. See Public Lands, 4.

SELF-DEFENSE. See Criminal Law, 21, 22, 23, 26.

SEPARATE PROPERTY.

Community becomes, when conveyed by husband to wife. See Husband and Wife, 1.

SHERIFFS.

Compensation provided by law conclusive. See Officers, 1, 2.

SITUS.

Of debt for purposes of garnishment. See Insurance, 1.

SPECIAL LAWS. See Constitutional Law, 4.

STATEMENT OF FACTS.

Agreed, must be approved by trial court. See Appeal and Error, 24.

STATUTE OF LIMITATIONS.

1. **STATUTE OF LIMITATIONS—SUBSTANTIVE DEFENSE—PLEADING — MUST BE RAISED BY ANSWER OR PLEA—MINES AND MINING—ADVERSE—** SEC. 2326, REV. STATS. U. S., CITED.—An issue as to whether an action was brought within the thirty days required by statute, *supra*, was sought to be raised by a motion for judgment on the pleadings and a motion to strike from the files. *Held*, that the statute of limitations is a substantive defense which can only be raised by answer or plea. (Providence Gold Mining Co. v. Marks, 74.)

On filing of adverse. See Appeal and Error, 7.

STATUTORY CONSTRUCTION.

1. **STATUTORY CONSTRUCTION—STATUTES NOT IN EXPRESS TERMS REPUGNANT—REPEAL BY IMPLICATION.**—When two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former, and embraces new provisions, plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act. (Utter v. Franklin, 300.)
2. **STATUTORY CONSTRUCTION—WEIGHT TO BE GIVEN CONSTRUCTION OF STATUTE BY THOSE CHARGED WITH ITS EXECUTION.**—The contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. (Avery v. Pima County, 26.)

See Water and Water-Rights, 13.

SUNDAYS.

Intermediate Sunday included in computing time allowed for making motion for new trial. See Appeal and Error, 28.

SUPERSEDEAS.

Certiorari takes effect as upon delivery to officer or board and renders subsequent proceedings before him or it *coram non judice* and void. See *Certiorari*, 1.

SUPREME COURT.

1. **SUPREME COURT — JURISDICTION — POWER — WRIT OF PROHIBITION—** MAY BE ISSUED ALTHOUGH NOT MENTIONED *EO NOMINE* IN STATUTE —REV. STATS. U. S., SECS. 1866, 1868, AND REV. STATS. ARIZ. 1887, PARS. 591, 594, CITED AND CONSTRUED.—Section 1866 of the Revised Statutes of the United States provides that original and appellate jurisdiction of territorial courts shall be limited "by law." Section 1868 of the Revised Statutes of the United States provides that the supreme courts of every territory shall possess

SUPREME COURT (Continued).

chancery as well as common-law jurisdiction. Paragraph 591 of the Revised Statutes of Arizona of 1887 vests the supreme court, in addition to the powers conferred on it by the laws of the United States, with full powers to discharge all duties required of it by the laws of the territory. Paragraph 594, *supra*, gives the court power to issue all writs necessary to a complete exercise of the powers conferred by law. *Held*, that the power of the supreme court to issue writs of prohibition has been conferred by Congress, and recognized by the territorial legislature, although no statute may exist which mentions the writ of prohibition *eo nomine*. (The Crowned King Mining Co. v. The District Court, 263.)

Jurisdiction. See Appeal and Error, 36, 37.

Power of to render judgment on appeal. See Appeal and Error, 3.

TAXES AND TAXATION.

1. TAXES AND TAXATION—BOARD OF EQUALIZATION—JURISDICTION—LIMITED—RECORD—MUST SHOW AFFIRMATIVELY ALL FACTS NECESSARY TO GIVE JURISDICTION—PRESUMPTIONS.—The board of equalization, in acting upon the assessment-roll, is a body possessed of but limited and special powers. When its power and authority to do a particular thing are questioned, the record must exhibit affirmatively all the facts necessary to give it the authority to do the act complained of; otherwise, the presumption is against its jurisdiction. (Copper Queen Consolidated Mining Company v. Board of Equalization of Cochise County, 364.)
2. SAME—SAME—SAME—ORIGINAL—APPELLATE—RECORD—FAILURE TO SHOW FACTS GIVING JURISDICTION—INCREASE OF ASSESSMENT—CONDITIONS PRECEDENT—REV. STATS. ARIZ. 1887, PAR. 2654, CONSTRUED.—The statute, *supra*, defines and limits the power and authority of the board of equalization, and provides that its original jurisdiction to add to the valuation of property must be exercised at the July sitting, and that action on a day named after a reasonable notice to the persons interested, is essential as a condition precedent to confer that jurisdiction. It further provides that its jurisdiction at the August sitting is purely appellate, and is dependent upon the appearance before them of the person to the assessed value of whose property there was an amount added in July, and the affidavit of such person that he had no knowledge of such increased valuation. The record of the board showed that the original action of the board in adding to the assessed valuation was taken on the twelfth day of July, on which day appellant's superintendent was notified to be present on the nineteenth day of July, when the board would act in the matter; that said superintendent did not appear; that no action of the board was then taken, nor was there further action thereon until August 1st. The record is conflicting as to whether the addition was made on July 12th or August 1st. *Held*, that an examination of the record as furnished in the return failed to show the jurisdictional facts

TAXES AND TAXATION (Continued).

which would render legal or binding the action of the board in raising the assessment either on the twelfth day of July or the first day of August. (*Copper Queen Consolidated Mining Company v. Board of Equalization of Cochise County*, 364.)

3. **TAXES AND TAXATION—SALE FOR DELINQUENT TAXES—TITLE CANNOT BE STRENGTHENED BY PURCHASE AT TAX SALE, IF PURCHASER IS BOUND TO PAY TAXES.**—One who is under any legal or moral obligation to pay taxes cannot, by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale. (*Allen v. Evans*, 359.)
4. **SAME—SAME—ONE IN POSSESSION, IF NOT BOUND TO PAY TAXES, MAY PURCHASE.**—One who is under no legal or moral obligation to pay taxes is not precluded from purchasing at the tax sale, although in possession at the time the assessment was made or when the land was sold. (*Allen v. Evans*, 359.)
5. **SAME—SAME—ACTION TO ENJOIN—INJUNCTION—WILL ONLY BE GRANTED WHERE PLAINTIFF SHOWS CLEAR AND UNEXCEPTIONABLE RIGHT.**—Plaintiff alleged that he purchased property at foreclosure sale on March 26, 1894; that possession had never been obtained by him; that on the same day defendant entered into possession claiming title under two deeds of prior date duly recorded and had continuously remained in possession, receiving the rents, issues, and profits therefrom; that while so in possession, and claiming ownership, the defendant suffered the taxes to become delinquent and the premises to be sold therefor; that at the sale the defendant became the purchaser; that these acts were done to cast a cloud upon plaintiff's title and to defraud plaintiff of the premises by obtaining a deed therefor, and prayed for a perpetual injunction restraining the treasurer from signing a deed to defendant, and defendant from receiving any deed based upon said tax sale. *Held*, that the complaint fails to state facts sufficient to entitle the plaintiff to relief by injunction, it appearing therein that the title to the premises is in dispute. (*Allen v. Evans*, 359.)

See Appeal and Error, 37.

TENANTS IN COMMON. See Water and Water-Rights, 5.

TIMBER.

Bona fide residents may cut. See Public Lands, 2.

Mesquite may be, question of fact for jury. See Criminal Law, 23.

Right to cut, on mineral lands. See Public Lands, 1.

See Public Lands, 3, 4.

TITLE.

Cannot be strengthened by purchase at tax sale if purchaser is bound to pay taxes. See Taxes and Taxation, 3.

TOWN-SITES.

Trustee, authority to dispose of unoccupied lots, whence derived.
See Public Lands, 5.

TRANSFER.

Of live-stock. See Live-Stock, 1.
See Water and Water-Rights, 7.

TRESPASS.

1. TRESPASS — EVIDENCE — PARTNERSHIP — NOT LIABLE FOR ACTS OF INDIVIDUAL MEMBERS NOT DONE FOR ITS BENEFIT OR IN ITS BEHALF. — Where a member of defendant partnership purchased at sheriff's sale a quartz-mill under a judgment foreclosing a lien which defendant partnership had thereon, and thereafter took such mill from the possession of plaintiff, an action of trespass cannot be maintained as against the partnership in absence of proof to show that any part of the mill came into possession of the firm, or that the transaction was intended for its benefit. (Wolfley v. Brown, 157.)

See Water and Water-Rights, 3.

TRIAL.

De novo. See Appeal and Error, 38.

TRUSTEE.

Of town-sites, authority to dispose of unoccupied lots, whence derived. See Public Lands, 5.

TRUSTS.

1. TRUSTS — RESULTING TRUST — FRAUD — PLEADING. — F. and D., who lived in Chicago, became joint purchasers of certain mining property in Arizona, the deed being placed in escrow in Prescott, in the name of F. for the benefit of both, said deed containing a forfeiture clause on the non-payment of any of the installments of the purchase price by F. Thereafter a corporation was formed to own and operate the mine, and an agreement was entered into whereby F. was to transfer the mining property to the corporation and receive in payment therefor a certain amount of stock issued to himself and D. Shortly before a certain payment became due, D. went to Arizona, F. paying half the expense of the trip, for the purpose of becoming thoroughly acquainted with the property in order to more effectually sell the stock. D. agreed to make the next payment when it fell due, or to notify F. in time for him to do it. Upon his arrival in Arizona, D. represented that F. was irresponsible and had no intention of completing the purchase. He then secured an agreement from the owner of the property that it was to be conveyed to him upon the same terms, provided F. failed to make the payment. D. then notified F. that

TRUSTS (Continued).

he had secured an extension of time for the payment. After default in payment, D. secured and transferred the property to the defendant corporation, which had full knowledge of the facts, and received therefor the stock which should have been issued to himself and F. In an action by F. to recover from D. and the corporation the value of the stock which should have been issued to him, *held*, that a complaint setting out the above facts stated a good cause of action, and a demurrer thereto was properly overruled. (Sun Dance Gold Mining Co. v. Frost, 289.)

2. **SAME—SAME—SAME—SAME—FRAUD NEED NOT BE ALLEGED IN ACTION AGAINST TRUSTEE FOR APPROPRIATING PROPERTY OF CESTUI QUE TRUST.**—Where F. and D. were jointly interested in the purchase of certain mining property and its transfer to a corporation for stock therein, and D. secured the issuance of all the stock to himself, to the exclusion of his co-owner and partner in the transaction, the fiduciary relations existing between F. and D. render it unnecessary for F. to allege and prove actual fraud in an action to recover from D. the value of the stock which should have been delivered to him. (Sun Dance Gold Mining Co. v. Frost, 289.)

3. **SAME—SAME—SAME—CORPORATION—LIABLE TO CESTUI QUE TRUST WHERE IT TRANSFERS HIS PROPERTY TO TRUSTEE WITH NOTICE OF FRAUD.**—Where F. and D. were jointly interested in the purchase of certain mining property and its transfer to a corporation for stock therein, and D. secured the issuance of all the stock to himself to the exclusion of his co-owner and partner in the transaction, by certain fraudulent acts, and the corporation had full knowledge of the whole transaction, *held*, that the corporation by so transferring the stock to D. rendered itself liable to F. for the value of his share thereof. (Sun Dance Gold Mining Co. v. Frost, 289.)

UNINCORPORATED ASSOCIATION.

Certificates of stock evidence of contract between the several members, not only as to the ditch but as to the distribution of water. See Water and Water-Rights, 7.

Has title to ditch. See Water and Water-Rights, 6.

Members tenants in common. See Water and Water-Rights, 5.

See Water and Water-Rights, 8, 9, 10, 11, 12.

UNITED STATES PRISONERS.

1. **UNITED STATES PRISONERS—IMPRISONMENT IN COUNTY JAILS—MAINTENANCE—CONTRACTS—PROPER PARTIES TO MAKE—REV. STATS. U. S., SECS. 5539, 5547, AND REV. STATS. ARIZ. 1887, PARS. 397, 398, 2459, 2460, 521, 1972, CONSTRUED.**—Sections 5539 and 5547 of the Revised Statutes of the United States provide that United States criminals imprisoned in the jail or penitentiary of any state or territory shall be under the control of the officers having charge of the same, and authorize the attorney-general to contract with the

UNITED STATES PRISONERS (Continued).

proper authorities having control of such prisoners for their imprisonment, subsistence, etc. *Held*, construing the Revised Statutes of Arizona, *supra*, that the supervisors are the authorities that have the control and management of the United States prisoners, and are the proper persons with whom the department of justice should make the contract. (*Avery v. Pima County*, 26.)

USE.

Change of. See Water and Water-Rights, 10.

VERDICT.

"Degree" misspelled "Decree" does not vitiate. See Criminal Law, 25. Will not be disturbed where any evidence to sustain. See Criminal Law, 41.

Will not be disturbed where conflict of evidence. See Criminal Law, 20, 31, 35.

See Appeal and Error, 31.

VOIR DIRE.

Court to hear testimony upon and decide. See Juror, 3.

WAIVER.

Of all errors not assigned in brief. See Appeal and Error, 5.

Of all errors not fundamental, by failure to make assignment of errors. See Appeal and Error, 1, 10, 30.

WATER AND WATER-RIGHTS.

1. WATER AND WATER-RIGHTS—CANAL COMPANIES—NEGLIGENCE—PLEADINGS—ISSUES—INSTRUCTIONS TO JURY.—Where the complaint alleged that plaintiff's land was flooded and damaged by reason of the negligence of defendant in the operation of its canal, and the answer denied the negligence, but contained no allegation of contributory negligence, a charge to the jury that if plaintiff's horses and cattle tramped down the borders of the canal and caused the break, or if any direct agency of the plaintiff caused the break, he could not recover, is not erroneous, upon the theory that it is an instruction to find for the defendant because of plaintiff's contributory negligence, as under the pleadings, the evidence not being in the record, any evidence tending to show that the break was by the direct acts or agency of plaintiff, and such acts were of such nature or committed under such circumstances as not to import negligence on the part of the defendant, in not being aware of them or anticipating their results, would have been competent and would have fully justified the instruction. (*Bil-lups v. Utah Canal etc. Co.*, 211.)

WATER AND WATER-RIGHTS (Continued).

2. **SAME—SAME—SAME—DAMAGES—PLEADINGS—ISSUES—SCOPE OF EVIDENCE—INSTRUCTIONS TO JURY.**—Where the complaint alleged that plaintiff's land was flooded and damaged by reason of negligence of defendant in the operation of its canal, and the answer denied every material allegation of the complaint, the question of damage was in issue, and evidence would have been competent to show that the flooding was a benefit instead of a damage. The evidence not having been incorporated in the record, it must be assumed that evidence was given which rendered proper an instruction that plaintiff could not recover if his lands were benefited instead of damaged by the flood. (*Billups v. Utah Canal etc. Co.*, 211.)
3. **WATER AND WATER-RIGHTS—DIVERSION—CHANGING POINT OF—TRESPASS—ESTOPPEL.**—Where an appropriator of water has for more than six years maintained a diversion dam within and a ditch across the field of another, the owner of the field is estopped by his acquiescence from denying the appropriator's rights therein upon the ground that he is a trespasser. (*Miller v. Douglas*, 41.)
4. **SAME—PUBLIC LANDS—ENTRY—SUBJECT TO EXISTING DITCH RIGHTS.**—One taking possession of unoccupied public land takes it subject to the condition in which he finds it as to rights of way for ditches used in connection with valid appropriations of water. (*Miller v. Douglas*, 41.)
5. **WATER AND WATER-RIGHTS—IRRIGATION—UNINCORPORATED ASSOCIATION—MEMBERS—STATUS—TENANTS IN COMMON.**—The *status* of the members of an unincorporated irrigating ditch company, in so far as the dam and ditch, the property of the association, is concerned, is that of tenancy in common. (*Biggs v. Utah Irrigating Ditch Co.*, 331.)
6. **SAME—SAME—SAME—TITLE TO DITCH—APPROPRIATION.**—There is a clear distinction between the property of an unincorporated irrigating ditch association, which consists of the dam and ditch, and which is held in common by the members of the association, and the right of appropriation which each member thereof has by virtue of being the owner or possessor of land irrigated by water from the river by means of such dam and ditch. (*Biggs v. Utah Irrigating Ditch Co.*, 331.)
7. **SAME—SAME—SAME—CERTIFICATES OF STOCK—CONTRACTS—APPROPRIATION—TRANSFER.**—Where an unincorporated irrigating ditch company issued to its members certificates which were treated by the members as evidencing their titles to the dam and ditch the property of the association, their right to a voice in the management and control of the property, and also the amount and extent of the appropriation of water by each, or at least as evidencing the measure of their right in times of scarcity, such certificates are evidences of the contract between the several members constituting the association, not only as to the ditch and

WATER AND WATER-RIGHTS (Continued).

dam, but as to the distribution of the water diverted thereby, and the sale and alienation thereof is in effect a conveyance not only of the interest in the dam and ditch but as well the water-right owned and possessed by the original holder thereof. (*Biggs v. Utah Irrigating Ditch Co.*, 331.)

8. SAME—SAME—SAME—SAME—APPROPRIATOR—PRIORITY—GOVERNS—IN ABSENCE OF CONTRACT—WATER-USERS UNDER A COMMON DITCH MAY CONTRACT AMONG THEMSELVES AS TO METHOD OF SERVICE—Independent of any statutory provision upon the subject, wherever the right of prior appropriation of water is recognized and enforced, each appropriator of water under a ditch, whether such ditch be held in common or owned by a corporation, is entitled, in the absence of a contract between the owners of the ditch, to be supplied in the order of his priority of appropriation. But this right is a property right and one which may be the subject of contract, and there is no statute in this territory which prevents appropriators of water by means of a common ditch from agreeing among themselves as to the manner in which they may enjoy their several appropriations. (*Biggs v. Utah Irrigating Ditch Co.*, 331.)

9. SAME—SAME—SAME—PRIORITY—ACCORDING TO OLDEST TITLES LIMITED TO PUBLIC DITCHES—PRIVATE DITCHES—PRIORITY DETERMINED BY APPROPRIATION AND USE—REV. STATS. ARIZ. 1887, PARS. 3201, 3215, 3223, CONSTRUED.—Paragraph 3215, *supra*, providing that the oldest land titles shall have precedence always in the use of water in times of scarcity, in its strict application must be limited to public ditches. Paragraphs 3201, 3215, and 3223 together, so far as private ditches are concerned, are to be construed as declaring that not mere priority of diversion, but priority of use and appropriation of water upon particular lands, shall govern in determining conflicting rights. (*Biggs v. Utah Irrigating Ditch Co.*, 331.)

10. SAME—SAME—SAME—MEMBERS—APPROPRIATION—SALE—CHANGE OF USE—APPLICATION OF WATER TO LAND OTHER THAN THAT FOR WHICH ORIGINALLY APPROPRIATED—REV. STATS. ARIZ. 1887, PARS. 3201, 3215, 3223, CONSTRUED.—The statutes, *supra*, while recognizing the ownership and possession of land as essential to the acquisition and enjoyment of a water-right for purposes of irrigation, and while limiting its use to the particular lands to which it is attached, do not deny the right of alienation and the transfer of such right from one particular tract of land to another, except under the limitations that the transferee is of the class of persons entitled to make a valid appropriation by virtue of being the owner or possessor of arable and irrigable land, and that such change does not injure another having rights which have accrued at the time of such transfer and change of use. (*Biggs v. Utah Irrigating Ditch Co.*, 331.)

WATER AND WATER-RIGHTS (Continued).

11. ~~SAME—SAME—SAME—SAME~~—ESTOPPEL—DALTON v. RENTARIA, 2 ARIZ. 275, 15 PAC. 37, CITED.—Where certain holders of certificates in an unincorporated ditch company, which represented an interest in the ditch and water diverted thereby, sold such certificates to persons who located under an extension of the canal, and these transferees up to the time of the commencement of the suit, being from eight to sixteen years, with the acquiescence of the other holders of certificates, have enjoyed the same use of water, and the same equal division in times of scarcity, and have reclaimed and cultivated lands under the belief that they had an equal right to water, those who retained their certificates and original holdings are thereby estopped from asserting a priority of right in themselves. (Biggs v. Utah Irrigating Ditch Co., 331.)
12. ~~SAME—SAME~~—PRESCRIPTION.—Where certain Indians acquired rights to water from a canal by labor in the construction and maintenance of the canal, without becoming shareholders, and have been accorded such rights for twenty years or more, those rights are in their nature prescriptive, and a judgment apportioning them water in accordance with the amount shown to have been used, upon condition that they shall perform labor and contribute a proportionate amount toward the expense of maintenance, as they have been accustomed to do is not unreasonable or erroneous. (Biggs v. Utah Irrigating Ditch Co., 331.)
13. WATER AND WATER-RIGHTS—APPROPRIATION—STATUTES—CONSTRUCTION—FOREIGN DECISIONS.—The legislation of the territory of Arizona differs fundamentally upon the subject of appropriations of water for beneficial uses from the legislation of other states and territories, with the single exception of the territory of New Mexico, and, therefore, the decisions of other states are not controlling in the decision of questions which arise under local laws. (Slosser v. Salt River Valley Canal Co., 376.)
14. ~~SAME—SAME~~—CORPORATION—RIGHT TO APPROPRIATE—COMP. LAWS ARIZ. 1871, CHAP. 55, SECS. 3, 7, (REV. STATS. ARIZ. 1901, PARS. 4176, 4180,) CONSTRUED.—A corporation is included among persons authorized to construct acequias and make an appropriation of water for agricultural purposes. (Slosser v. Salt River Valley Canal Co., 376.)
15. ~~SAME—SAME~~—BASIS OF RIGHT—COMP. LAWS ARIZ. 1871, CHAP. 55, SECS. 1, 3, 7, (REV. STATS. ARIZ. 1901, PARS. 4174, 4176, 4180,) CONSTRUED.—Under the statutes, *supra*, the ownership and possession of arable and irrigable land is essential for the acquisition of the right of appropriation of water from a public stream for purposes of irrigation. (Slosser v. Salt River Valley Canal Co., 376.)
16. ~~SAME~~—CORPORATIONS—APPROPRIATION.—A corporation organized for the purpose of diverting and delivering water from a public stream to water-users and not itself the owner or possessor of arable or

WATER AND WATER-RIGHTS (Continued).

- irrigable land is not an appropriator of water. (*Slosser v. Salt River Valley Canal Co.*, 376.)
17. **SAME—APPROPRIATION—DEFINITION.**—The definition of an appropriation involves the idea of the use or application of water from a public stream for a beneficial purpose, under conditions prescribed by statute, or by custom having the effect of law, so as to vest a permanent right to such use and application, and necessarily involves an equally fixed or permanent ownership or control of the means by which the use and application may be enjoyed. (*Slosser v. Salt River Valley Canal Co.*, 376.)
18. **SAME—SAME—DIVERSION—OWNERSHIP.**—Means of diversion may be owned in common by a number of appropriators, or such means may be owned by one person and the appropriation by another, provided the latter has a fixed or permanent right, by contract or otherwise, entitling him to the service of such means for the purpose of his appropriation. (*Slosser v. Salt River Valley Canal Co.*, 376.)
19. **SAME—SAME—HOW PERFECTED.**—An appropriator may immediately, by constructing and owning his own ditch or canal, or, mediately, by acquiring the permanent right to the service of another's ditch or canal, whether the latter be owned by a natural or artificial person, perfect his appropriation. (*Slosser v. Salt River Valley Canal Co.*, 376.)
20. **SAME—SAME—DIVERSION—BY CORPORATION—AGENCY.**—A corporation organized for the purpose of furnishing water for agricultural purposes, to be used by others in privity of contract with it, becomes the mere agent of the latter, and may divert from a public stream water which the latter may acquire and use for purposes of irrigation, and the measure of its right to divert is the needs and requirements of those owners or possessors of arable and irrigable lands with whom, by contract, it stands in relation as agent. (*Slosser v. Salt River Valley Canal Co.*, 376.)
21. **SAME—PUBLIC PROPERTY.**—Water, being public property in a running stream, continues to be public property even when diverted for beneficial uses, and remains such until actually applied to such uses. (*Slosser v. Salt River Valley Canal Co.*, 376.)
22. **SAME—APPROPRIATION—CONTROL OF.**—Whenever an appropriator of water ceases to use for a beneficial purpose any water which has its source in a public stream, his power or authority to control the same ceases. (*Slosser v. Salt River Valley Canal Co.*, 376.)
23. **SAME—CANAL COMPANIES—SHARES.**—Where a corporation and its shareholders have regarded each share as carrying with it a water-right in the canal, as between the corporation and its members and between the shareholders themselves, the ownership of such shares of stock may establish all the rights to the use of water

WATER AND WATER-RIGHTS (Continued).

- which would follow were the owners of such shares tenants in common in the canal, provided each stockholder claiming said right has made an actual application of it to a beneficial use. (*Slosser v. Salt River Valley Canal Co.*, 376.)
24. **SAME—WATER-RIGHTS—MUST BE ATTACHED TO LAND.**—A water-right, to be effective, must be attached to land, and become, in a sense, appurtenant thereto. (*Slosser v. Salt River Valley Canal Co.*, 376.)
25. **SAME—CANAL COMPANIES—SHARES—SERVICE TO NON-SHAREHOLDERS ON ORDER OF SHAREHOLDERS.**—Shareholders, as such, in a corporation not the appropriator of water possess no rights as appropriators of water, and the practice of the corporation of recognizing shares of stock as "floating water-rights" and "selling water" for irrigating seasons to persons who are not water-right holders in the company upon the orders of shareholders, is the same in effect as though it supplied such users with water without the consent of such shareholders. (*Slosser v. Salt River Valley Canal Co.*, 376.)
26. **SAME—DIVERSION—CHANGE IN MEANS OF—ABANDONMENT.**—Where it appears that plaintiff appropriated water through a certain ditch, and thereafter, on account of increased diversion of water by defendant's and other canals further upstream and the difficulty of maintaining his former canal, changed his mode of diversion to defendant's canal, which served his land with water for ten years, and then in an action against other canals involving the right to divert water defendant secured a decree in its favor, establishing its right to divert water for plaintiff's land, defendant is estopped from claiming that plaintiff has abandoned his appropriation through the former canal. (*Slosser v. Salt River Valley Canal Co.*, 376.)
27. **SAME—CANAL COMPANIES—PRIVATE AGENT.**—A corporation, not an owner or possessor of arable or irrigable lands, diverting water from a public stream for the purpose of supplying the owners or possessors of arable or irrigable lands, and confining its service to the diversion and carriage of water, as the agent of particular appropriators of water, with whom it has fixed contractual relations binding it to perform such service, is a private agent, and cannot be compelled to render such service to others. (*Slosser v. Salt River Valley Canal Co.*, 376.)
28. **SAME—SAME—PUBLIC AGENT.**—A corporation not an owner or possessor of arable or irrigable lands, if it undertakes to and does divert and carry water for the use of consumers of water, not as the agent of particular appropriators, with whom it has fixed contractual relations to furnish water, becomes a public agent, and cannot under the law discriminate by giving preference other than with due regard to priority of appropriation. (*Slosser v. Salt River Valley Canal Co.*, 376.)

WATER AND WATER-RIGHTS (Continued).

- 29. SAME — SAME — WATER-RIGHTS — TRANSFER—UNDER WHAT CONDITIONS ALLOWABLE—MUST BE ATTACHED TO PARTICULAR LAND.—**
A shareholder in an irrigation company who is also a water-right holder by virtue of his ownership of a share of stock and the ownership or possession of arable and irrigable land irrigated by means of such water-right may not assign such water-right to another to be used upon lands which the assignor does not own or possess while said assignor retains the land to which such right is attached, since a water-right, to be effective, must be attached to and pertain to a particular tract of land, and cannot be made to do duty to such land as well as to land not owned or possessed by such water-right holder at the will or option of the latter. (*Slosser v. Salt River Valley Canal Co.*, 376.)
- 30. SAME — SAME — CANAL COMPANY—CORPORATIONS—PUBLIC AGENT—NON-WATER-RIGHT HOLDER—RIGHT TO SERVICE—DISCRIMINATION.—**
A corporation, by adopting and continuing the practice of supplying water to others than its water-right holders owning or possessing arable or irrigable land, not being itself an appropriator of water carried or the owner thereof, and dealing with public property, became a public agency to the extent that plaintiff at the time he made his application for water, although not the owner or lessee of a water-right, was entitled, upon the payment of the charge for similar service to other non-water-right holders, whether holders of orders from water-right holders or not, to have delivered upon his lands water sufficient for the irrigation thereof, in preference to other non-water-right holders whose appropriations were subsequent in time. (*Slosser v. Salt River Valley Canal Co.*, 376.)
- 31. SAME—SAME—SAME — DUTY TO SERVE NON-WATER-RIGHT HOLDERS SECONDARY.—**Non-water-right holders in an irrigating canal corporation are not on a parity of right with water-right holders therein, the corporation owing a first duty to supply the needs of its water-right holders and a secondary duty to serve surplus waters to the non-water-right holders. (*Slosser v. Salt River Valley Canal Co.*, 376.)

WITNESSES.

Competency, in suits by or against executors and administrators.

See Contracts, 3; Evidence, 1, 2, 3.

Credibility of defendant when appearing as. See Criminal Law, 10.

Credibility, not subject to review on appeal. See Personal Injuries, 2.

Prosecution not bound to summon eye-witnesses of the killing in murder trial. See Criminal Law, 7.

WRIT OF PROHIBITION.

- 1. WRIT OF PROHIBITION—WHEN ISSUES AS MATTER OF RIGHT—WHEN DISCRETIONARY WITH COURT.—**Where it appears that a court whose

WRIT OF PROHIBITION (Continued).

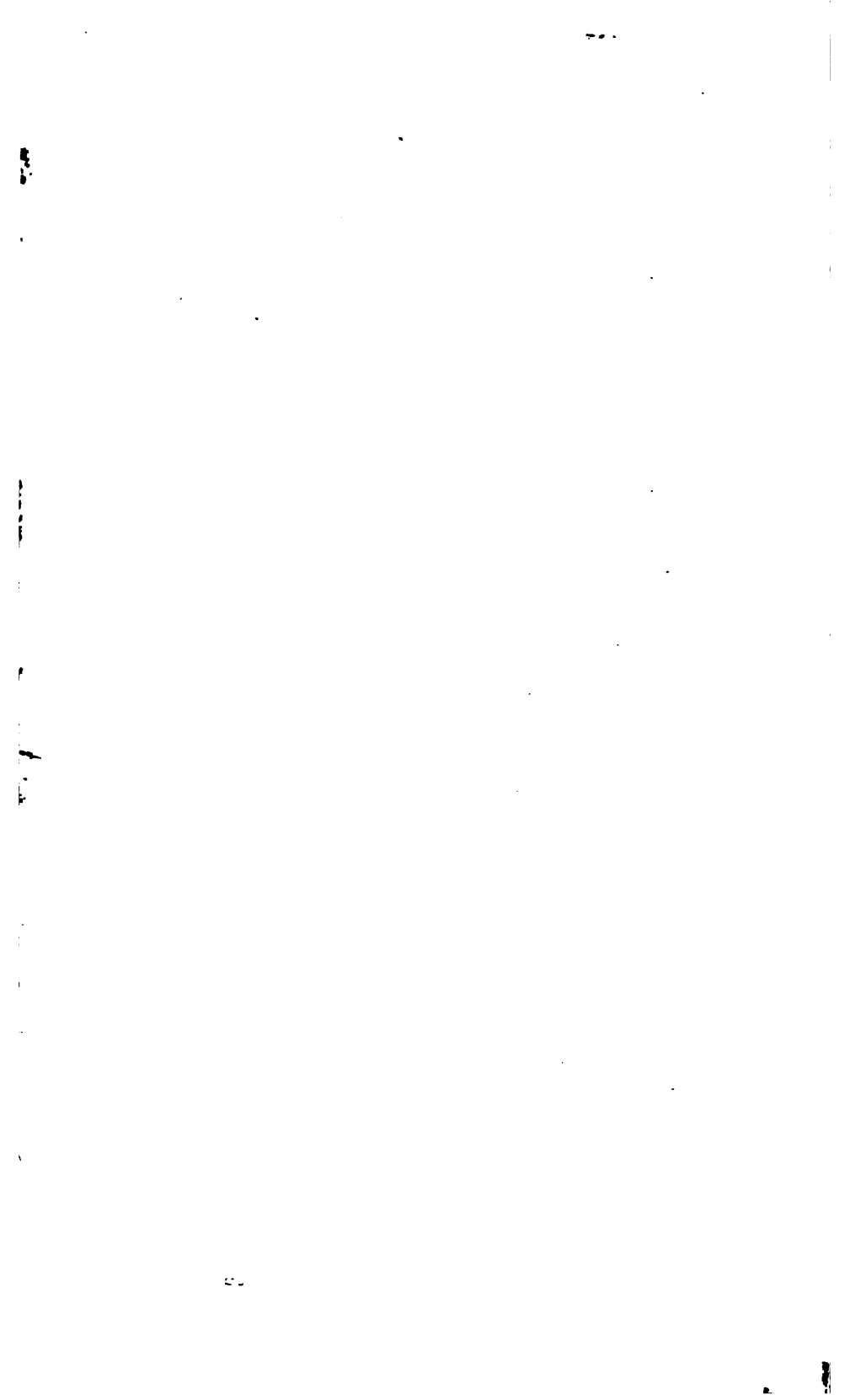
action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. (The Crowned King Mining Co. v. The District Court, 263.)

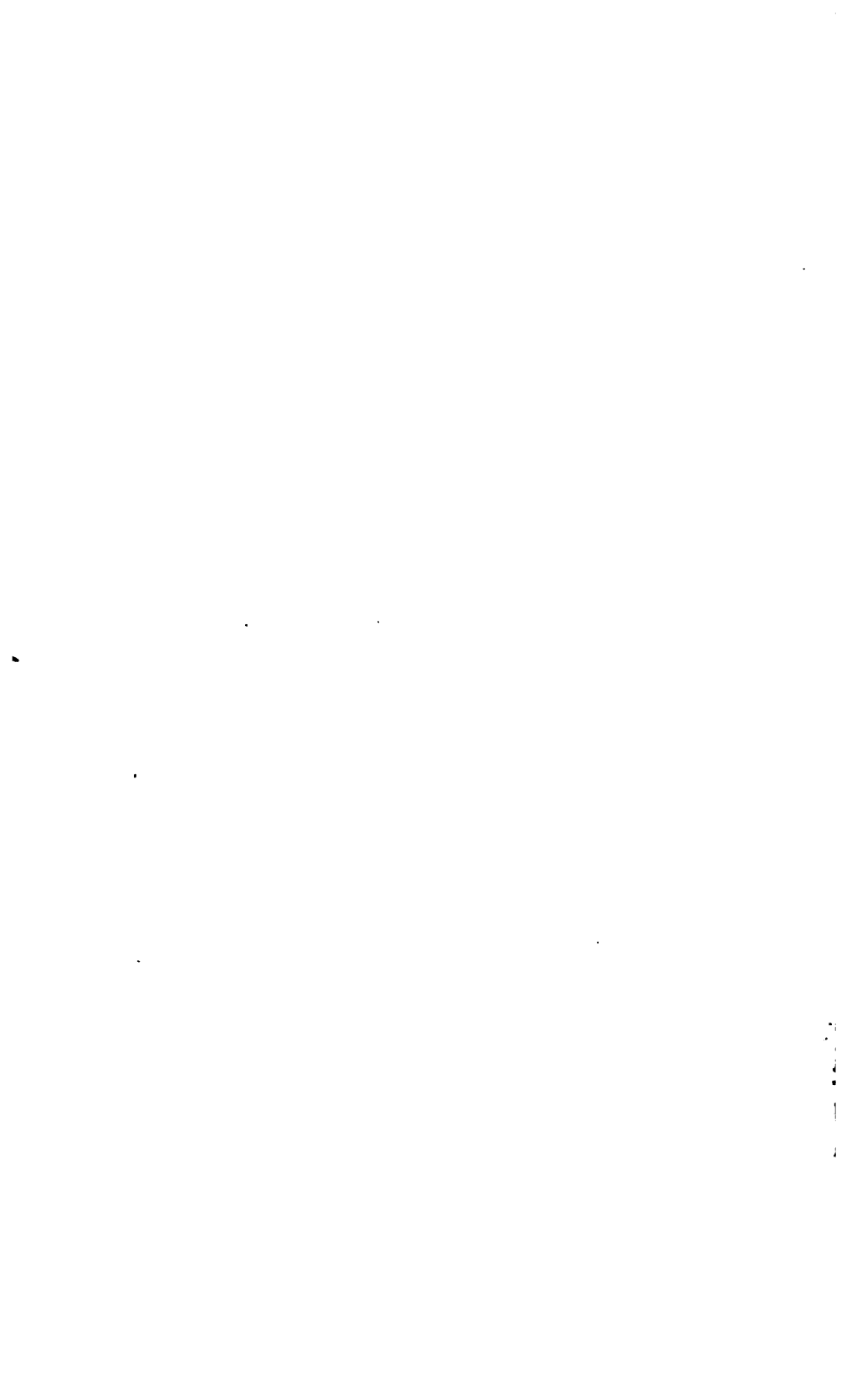
2. ~~SAME—SAME—SAME—FACTS REVIEWED AND WRIT DENIED.~~—Defendant brought suit against a foreign corporation and other persons, some of whom were non-residents, alleging that the corporation owned the property and was doing business in the county where the action was commenced, and that plaintiff and the managers of the corporation were residents of said county, and that the corporation, through its managers, was operating its property in such manner as to be detrimental to the interests of plaintiff, who was largely interested therein, and alleging other matters which could only be questioned in a court of the corporation's domicile. On an application for a writ of prohibition to prohibit the district court from trying said cause, it not being clear that the district court had no jurisdiction, the writ would not issue as a matter of right; and if the district court was in error in holding that it had jurisdiction, such decision being appealable, the granting of the writ being discretionary, it would be denied. (The Crowned King Mining Co. v. The District Court, 263.)

Supreme court has power to issue, although writ not mentioned *eo nomine* in statute. See Supreme Court, 1.

By E. H. J.
4/23/66

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